No. _____

In The

Supreme Court of the United States

October Term, 1993

TRUSTEES OF THE WELFARE TRUST FUND, LOCAL UNION NO. 475, et al.,

Petitioners,

vs.

FRANCES J. DUNSTON, in her capacity as New Jersey Commissioner of Health, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a State Act which requires ERISA employee benefit plans ("ERISA Plans") and their trustees to act in a manner inconsistent with their obligation under ERISA to apply fund assets for the exclusive benefit of Plan Participants preempted by ERISA as applied to ERISA Plans?

2. Is it permissible under ERISA for states to tap the funds of ERISA Plans in financing health care reforms as a means of making up budgetary shortfalls and avoiding unpopular new, general taxes?

3. Is it permissible for states to erode the protections afforded by ERISA and invade the assets of employee benefit plans by laws disguised as laws of "general applicability?"

4. Does a State Act which:

A. Imposes on ERISA Plans surcharges which are not indirect costs associated with any hospital service to Plan Participants but rather a direct cost of hospital services rendered to other patients;

B. Imposes upon ERISA Plan Participants, which comprise only about fifteen percent (15%) of hospital patients, almost forty (40%) percent of the state mandated cost shifts;

C. Requires ERISA Plans to subsidize the medical bills of others favored by the law;

QUESTIONS PRESENTED FOR REVIEW – Continued

D. Refers specifically to ERISA Plans and singles out ERISA Plans in requiring hospitals to ask patients whether they belong to a "Union Welfare Plan";

E. Expressly excludes "self-funded Union Plans" from appealing hospital bills;

F. Divests enormous sums of money from ERISA Plans; and

G. Is predicated on the existence of ERISA Plans,

have such an effect on employee benefit plans as to be preempted by ERISA?

5. Is the "police power" analysis of preemption employed by the majority below inconsistent with decisions of this Court?

PARTIES TO THE PROCEEDING

Trustees of the Welfare Trust Fund, Local Union No. 475 and Willie A. Barnes, John J. Parkin, Jr., Sydney Felix, Herman Geiger, Vinston Lee King, Kevin E. Kline, Robert L. Rosa, William Brennan, James Murphy, Jr., Patricia McElligott, Frank L. Harpster, Kevin McCormick, Patrick Ryan, Jr., Richard Caufield, Anthony E. Smith, Robert Laveratt, John S. Wittek, John McQuilken, Christopher Shields, John Montesano, Roy E. Frank, John O'Neill, Jr., Frank Robinson, Dale Schaefer, Ralph Sibona, Robert D. Stevely, John J. Serra, Donald Sheridan, Wenceslao Soto, Michael J. Russo, Joseph P. Murphy, Jr., James M. Thrash, Gary R. Myers, Calvin R. Sutton, III, Ronald J. Zakarzewski, Frank Whitney, Sr., Ursula L. Myers, Jack Nachtigall, Lawrence Parkin, Edison Rodriguez, William Moran, Peter Byrne, Vincent Doffont, and Andrew Williams,

Plaintiffs,

Frances J. Dunston, in her capacity as New Jersey Commissioner of Health; New Jersey State Department of Health; New Jersey Hospital Rate Setting Commission, Administrator of the New Jersey Health Care Trust Fund; New Jersey Department of Human Services (Division) of Medical Assistance and Health Services; St. Michael's Medical Center, East Orange General Hospital; West Hudson Hospital; University of Medicine & Dentistry; Overlook Hospital; Morristown Memorial Hospital; Union Hospital; Riverview Medical Center; Northern Ocean Hospital System; Community Medical Center; The Hospital Center at Orange; Hunterdon Medical Center; St. Clares/Riverside Medical Center; Warren Hospital;

PARTIES TO THE PROCEEDING – Continued

Centrastate Medical Center; Somerset Medical Center; Robert Wood Johnson University Hospital; Zurbrugg Medical Center; The Mountainside Hospital; The Medical Center of Ocean County; Jersey Shore Medical Center; Columbus Hospital; John F. Kennedy Medical Center; Clara Maass Medical Center, and Elizabeth General Medical Center,

Defendants.

In addition to the foregoing parties, all parties to the consolidated proceeding in the Court of Appeals are listed in the caption of the Opinion of the Court of Appeals which is reproduced in the Appendix. (1a-16a)[1]

CORPORATE DESIGNATION OF PETITIONERS

In accordance with Rule 29.1, Petitioners state that they have no corporate parent, subsidiary or affiliate.

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[1] Petitioners rely upon and reference the separate bound Appendix filed by the Petitioners in *NYSA-ILA Welfare Fund, etc. v. Frances J. Dunston, etc., et al.*, No. 93-115. References are to the pages of such Appendix.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Trustees of the Welfare Trust Fund, Local Union No. 475, et al., Petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 14, 1993.

OPINIONS BELOW

The Judgment and Opinion of the Court of Appeals for the Third Circuit, which is unofficially reported at 61

U.S.L.W. 2723 (3rd Cir. May 14, 1993), are reproduced in the separately bound Appendix in Case No. 93-115 (1a-61a). The unreported Opinion and Order of the Court of Appeals Sur Petition for Rehearing *en banc* (62a-63a), and the Opinion and Order of the United States District Court for the District of New Jersey (64a-95a), which is reported at 793 F.Supp. 524 (D.N.J. 1992), are also reproduced in the Appendix.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The Judgment of the Court of Appeals for the Third Circuit was entered on May 14, 1993. Thereafter, the Court of Appeals denied a Petition for Rehearing by Order dated June 15, 1993. By Order dated July 8, 1993, entry of the mandate of the Third Circuit was stayed until July 22, 1993, pending the filing of a Petition for a Writ of Certiorari to the Supreme Court. By Order dated July 16, 1993, the stay was continued until August 6, 1993. This Petition is filed within ninety (90) days of the entry both of the Judgment of the Court of Appeals on May 14, 1993 and the denial of the Petition for Rehearing on June 15, 1993.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Supremacy Clause of the United States Constitution, Article VI, Clause 2, provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The relevent provision from the Employee Retirement Income Security Act of 1974, as amended, ("ERISA") is §514(a), 29 U.S.C. §1144(a) (1988), which provides that:

> (a) Supersedure; effective date.
>
> Except as provided in subsection (b) of this section, the provisions of this Subchapter and Subchapter III of this Chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

STATEMENT OF THE CASE

BACKGROUND OF SUIT

The Complaint herein (the "Complaint") was filed by the Trustees of the Steamfitters Welfare Fund Local Union No. 475 of Warren, New Jersey (the "Welfare Fund") and individual participants in the Welfare Fund (the "Participants") in the United States District Court for the District of New Jersey on February 3, 1992 under Civil No. 92-426(AMW). By Order dated May 12, 1992, the matter

was consolidated for all purposes with all other cases previously consolidated in the "United Wire" case, Civil No. 90-2639.[2]

The Complaint sought, *inter alia*, judgment for declaratory and injunctive relief declaring, pursuant to 28 U.S.C. §2201, that certain portions of the New Jersey Health Care Facilities Planning Act of 1971, as amended and supplemented by the Health Care Cost Reduction Act of 1978, N.J.S.A. 26:2H-1 et seq. (the "Act"), together with certain of the regulations promulgated thereunder (N.J.A.C. 8:31B-2.1 et seq.) were null, void and of no effect under the Supremacy Clause of Article VI of the United States Constitution, and that such provisions were in conflict with and preempted by the United States Constitution, the Labor of Management Relations Act of 1947 ("Taft-Hartley" or "LMRA"), 29 U.S.C. §141 et seq., and particularly 29 U.S.C. §186(c)(5), as well as the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et seq., and more particularly, 29 U.S.C. §1144(a). The Complaint further sought a declaration that such provisions violated the Equal Protection and Due Process Clauses of both the United States and New Jersey State Constitutions, constituted an illegal "special law" concerning taxation and an illegal delegation of taxing power under the New Jersey State Constitution. During the pendency of this action, the Welfare Fund has placed the disputed portion of each Participant's bill into an escrow fund.

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[2] The plaintiffs in the consolidated cases are referred to as the "Welfare Funds."

A. Plaintiffs

The Welfare Fund was established pursuant to the terms of the Collective Bargaining Agreement between Steamfitter, Pipefitters and Apprentices Local Union No. 475 ("Local No. 475") and the Mechanical Contractors Association of New Jersey (the "Association"). The Welfare Fund was established pursuant to and in accordance with the requirements of §302 of LMRA, 29 U.S.C. §186. It constitutes an employee benefit plan established and maintained by employers engaged in commerce and by an employee organization representing employees engaged in commerce in an industry and activity affecting commerce within the meaning of 29 U.S.C. §1003(a). It further is an employee benefit plan within the meaning of 29 U.S.C. §1002, supported by employer contributions pursuant to collective bargaining agreements and administered by a joint board of union and employer trustees for the benefit of collective bargaining unit members (the "Participants").

The Welfare Fund is a non-profit plan, self-insured and self-funded exclusively through employer contributions and not by way of outside insurance carriers, and provides its beneficiaries with a comprehensive health care program and retirement health benefits. The Welfare Fund is mandated by 29 U.S.C. §§186 and 1002 to expend funds only for the benefit of the Participants.

B. Defendants

The State Defendants[3] are charged under the Act with the administration or implementation of the hospital billing scheme established by the Act and regulations thereunder. Each of the Defendant Hospitals is required by N.J.S.A. 26:2H-18 to charge "payors" and patients in accordance with the schedule of rates approved by the State. All hospitals in New Jersey are classified as "health care facilities" which must obtain licenses in order to operate and must comply with rate procedures and schedules established by the Act.

C. Proceedings in District Court

After the filing of the Complaint and consolidation, the State Defendants and intervenor defendant, New Jersey Hospital Association (the "Hospital Association") moved to dismiss the Complaints pursuant to R. 12(c), Fed. R. Civ. P., and the various Welfare Funds cross-moved for summary judgment.

On May 27, 1992, District Judge Alfred M. Wolin granted summary judgment in favor of the Welfare Funds declaring that several aspects of the New Jersey Hospital billing scheme were pre-empted by ERISA. *United Wire, Health and Welfare Fund v. Morristown*, 793 F.Supp. 524

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[3] Frances J. Dunston, in her capacity as New Jersey Commissioner of Health; New Jersey State Department of Health; New Jersey Hospital Rate Setting Commission; Administrator of the New Jersey Health Care Trust Fund; and New Jersey Department of Human Services, Division of Medical Assistance and Health Services.

(D.N.J. 1992). The Court granted permanent injunctive relief barring the prospective enforcement of the challenged statutory regulatory provisions (94a), but, in order to allow the State an opportunity to file an expedited appeal and to seek a stay pending appeal from the Third Circuit, the Court *sua sponte*, stayed its injunction until June 5, 1992 (94a).

D. Appeal by Defendants

On June 17, 1992, the Hospital Association along with various individual defendant hospitals filed a notice of appeal. The State filed a notice of appeal shortly thereafter. By Order dated June 24, 1992, the Third Circuit granted a stay pending appeal and expedited the briefing schedule. On or about June 25, 1992, the Welfare Funds filed notices of cross appeal challenging the District Court's refusal to exercise jurisdiction over the claims for reimbursement of hospital bills paid under protest during the pendency of the lawsuit.

E. Third Circuit Decision

In a two to one decision announced on May 14, 1993, a panel of the United States Court of Appeals for the Third Circuit reversed the decision of Judge Wolin.

F. Petitions for Rehearing

Approximately five separate Petitions for Rehearing were filed on behalf of the Welfare Funds. On June 15, 1993, the Petitions for Rehearing were denied with a notation that Judge Nygaard, who had dissented in the

original decision, would have granted the Petitions for Rehearing. Motions thereafter were filed on behalf of the Welfare Funds seeking to stay issuance of the mandate. By Orders dated July 8, 1993, issuance of the certified judgment in lieu of formal mandate was stayed until July 22, 1993. On July 16, 1993, Orders were entered further staying the issuance of the certified judgment until August 6, 1993.

THE CHALLENGED DRG SYSTEM FOR HOSPITAL BILLS

In the District Court, Judge Wolin found that:

> The gravamen of the Complaint focuses on charges included within the hospital billing procedure which are in excess of a patient's "actual hospital costs". These include: cost of care for the indigent, charges to pay a hospital's bad debts, subsidies for the Medicare Program, and fees to reimburse hospitals for discounts given by the hospitals to other types of benefit plans. 793 F.Supp. at 526 (65a).

A. Total Charges

Pursuant to the Act, patients in New Jersey hospitals receive bills that contain several different statements of hospital charges. Each bill contains a "Total Charges" amount which is calculated by totalling a line-by-line itemization of the cost of hospital services rendered to a given patient. The Total Charges reflect the charges incurred by each patient for the services provided to that patient, including routine overhead costs associated with

hospitalization. These charges are ***not*** the ones normally paid by insured patients.

B. DRG Amount Due

Each hospital bill also contains the "DRG Amount Due".[4] This DRG Amount Due is calculated by the hospitals in accordance with the DRG rate setting procedures established under the Act. The DRG rate is selected by the hospital based upon the categorization of a patient's condition and treatment into one of 742 categories of medical conditions as defined by the Hospital Rate Setting Commission (the "Commission") and the New Jersey Commissioner of Health (the "Comissioner"). Each DRG category is assigned a hospital specific dollar amount which the hospital is required to charge to "purchasers of hospital services" regardless of whether the actual medical costs incurred in treatment are above or below the DRG rate. See, N.J.S.A. 26:2H-18; N.J.A.C. 8:31B-3.42.

C. Stated Intent of DRG Rate

The DRG rate is designed to set a prospective rate of reimbursement for each hospital in advance of actual treatment which is a blend of statewide averages of hospital resources consumed and hospital specific resources consumed in treating particular illnesses. N.J.Stat. Ann. 26:2H-5B. The DRG Amount Due set forth on each hospital bill, therefore, is not related to the actual costs

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[4] DRG stands for "Diagnostic Related Groups."

incurred by the patient, but rather upon a weighted average of costs incurred in statewide and hospital specific care for a given condition.

SURCHARGES ON DRG RATE

Although originally intended to be simply a weighted average of expected medical costs for a given condition, the DRG Amount Due no longer is such. The weighted average component (the "DRG Base Cost") is the base cost upon which surcharges are added to arrive at the DRG rate. Surcharges or "add-ons" are included in the DRG rate to pay for uncompensated medical care, the Medicare shift and payor differentials granted to various payors.

A. Uncompensated Care Surcharge

To compensate hospitals for indigent patients and bad debts incurred, referred to as "uncompensated care," a surcharge is added onto the DRG Base Cost. N.J.A.C. 8:31-3.41 and 7.1. This surcharge presently adds 19.1% to a hospital bill to pay for mandated care to indigents and the poor. This uncompensated care add-on is collected by each hospital and forwarded to the New Jersey Healthcare Trust Fund, which Fund then redistributes the money to hospitals statewide based upon the amount of uncompensated care costs incurred by each individual hospital. In the *Report of the Governor's Commission on Healthcare Costs*, (the "Governor's Report") this add-on for uncompensated care was characterized as a tax-subsidized social program of providing care to the poor.

According to the Governor's Report, uncompensated care costs increased from $288,000,000 in 1983 to $700,000,000 in 1990. Under the Act, the bulk of the subsidy for uncompensated care is taken from the Welfare Funds rather than the general public.

B. Medicare Cost Shift Surcharge

Each hospital bill also includes a 7% add-on to compensate hospitals for the "Medicare Cost Shift", which forces hospital payors other than Medicare patients to underwrite the shortfall between the DRG rate and the rate of reimbursement from Medicare for Medicare patients.

C. Surcharges for Discounts to Other Payors

The third cost shifting mechanism under the DRG Rate System involves "payor differentials" or discounts in payment rates available to certain classes of payors who demonstrate "quantifiable economic benefit" to the healthcare system. N.J.S.A. 26:2H-18(b); N.J.A.C. 8:31B-3.39. Payors which receive these discounts include Blue Cross, Blue Shield and HMO's. Due to restrictions imposed by ERISA, the Welfare Funds must limit their enrollment and are thus prohibited from receiving this discount and none of the Welfare Funds have been granted such a discount. As a result of the discounts offered to certain payors, a surcharge is levied on the remaining payors to offset revenue losses generated by such discounts. The Welfare Funds, therefore, are required to pay higher fees in order to make up for the discounts offered to other payors.

EXCLUSION OF ERISA PLAN PARTICIPANTS FROM RIGHT TO APPEAL

Under the appeal mechanism promulgated by regulation under the Act, uninsured patients, but not insured patients or third party payors, may obtain relief from excessive DRG Charges. All "non-insured" patients whose DRG Amount Due exceeds their actual medical costs by greater than $250 (95% of all non-insured patients) can appeal their bill for a reduction to the Total Charges amount. Greater than 99% of all such appealed bills are reduced to the actual medical costs incurred by the patient. Because Participants in the Welfare Funds are not permitted to appeal, the Welfare Funds again subsidize the system by underwriting the lower payments made by uninsured patients.

BALLOONING OF HOSPITAL BILLS

The DRG Amount Due exceeds the Total Charges Amount in approximately 85% of all hospital bills. In 1991, the average DRG Amount Due on a New Jersey hospital bill was approximately 60% higher than the Total Charges rate. Due to the numerous surcharges, the DRG rate is inflated significantly above both the actual medical cost incurred (Total Charges) and above the average medical costs incurred for each DRG category assignment (DRG Base Cost). These add-ons are levied exclusively upon hospital patients, a class which comprises less than 25% of New Jersey's residents in a given year. ERISA Plan Participants constitute but fifteen percent (15%) of this class of hospital patients, yet bear the brunt of almost

forty percent (40%) of the cost shifts mandated by the Act under the DRG system.

BASIS FOR FEDERAL JURISDICTION

The District Court found that it had jurisdiction over the plaintiff's claims brought under the United States Constitution, ERISA and Taft-Hartley pursuant to 28 U.S.C. §1132. The District Court further found jurisdiction over the causes of action arising under the New Jersey Constitution under principles of pendent jurisdiction and supplemental jurisdiction, 28 U.S.C. §1367. Venue was proper under 28 U.S.C. §1391. Jurisdiction in the Third Circuit on both the appeal and cross appeal from the final judgment of the District Court was pursuant to 28 U.S.C. §1291.

ARGUMENT

I. THE ACT "RELATES TO" ERISA PLANS AND THUS IS PREEMPTED

A. PRELIMINARY STATEMENT

By a two to one majority, in an Opinion announced on May 14, 1993, a panel of the Third Circuit Court of Appeals reversed the Decision of District Court Judge Alfred M. Wolin (793 F.Supp. 524 (D.N.J.1992)) (64a) which had concluded that challenged portions of the New Jersey Health Care Facilities Planning Act of 1971, as amended by the Health Care Cost Reduction Act of

1978, N.J.S.A. 26:2H-1, et seq. (the "Act") were unconstitutional and preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq., as amended ("ERISA"). This Petition is brought on behalf of the Welfare Trust Fund, Local Union No. 475 and individual Participants therein[5] seeking the granting of a Writ of Certiorari to the Third Circuit.

Goals of ERISA

ERISA is a comprehensive statute designed to promote the interest of employees and their beneficiaries in employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). In order to accomplish one of its main objectives of elimination of state regulation of employee benefit plans, ERISA contains a broad preemption provision in §514(a), 29 U.S.C. §1144(a), which provides that:

> Except as provided in subsection (b) of this section, the provisions of this Subchapter and Subchapter III of this Chapter (ERISA) shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .

29 U.S.C. §1144(a).

This Court consistently has determined that when, as here, Congress adopts a broadly worded preemption provision in a comprehensive statute, the task of discerning congressional intent is considerably simplified. *Ingersoll-*

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[5] Appellees in Third Circuit Case No. 92-5320 and plaintiffs in D.C. Civil No. 92-426.

Rand Co. v. McClendon, 498 U.S. 133, 138 (1990). In discussing the preemption provision in ERISA, which the Court has noted "is conspicuous for its breadth", *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) and "virtually unique", *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 n. 26 (1983), the Supreme Court has held that "its deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern". *Ingersoll-Rand v. McClendon*, supra at 138. Any doubts about Congressional intent are dispelled by the legislative history:

> The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's preemptive scope was as broad as its language.

Shaw v. Delta Air Lines, 463 U.S. 85, 98 (1983).

ERISA Preemption

The focus of any ERISA preemption analysis has traditionally been the issue of whether the state laws in question "relate to any employee benefit plan". 29 U.S.C. §1144(a). Guidelines established by this Court for such analysis include:

> A law *relates to* an employee benefit plan . . . if it has a connection with or reference to such a plan.

Shaw v. Delta Air Lines, Inc., supra at 96-97.

> Under this "broad common sense meaning," a State law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designated to affect such plans, or the effect is only indirect.

Pilot Life Ins. Co. v. DeDeaux, 481 U.S. 41, 47 (1987).

Preemption Analysis by Third Circuit

The majority below set forth essentially a two-pronged test for its pre-emption analysis:

> 1. A rule of law relates to an ERISA plan if it is specifically designed to affect employee benefit plans, if it singles out plans for special treatment, or if the rights or restrictions it creates are predicated on the existence of such a plan. (citations omitted) (25a).
>
> 2. A state rule of law may be preempted even though it has no direct nexus with ERISA plans if its effect is to dictate or restrict the choices of ERISA plans with regard to their benefits, structure, reporting and administration, or if allowing States to have such rules would impair the ability of a plan to function simultaneously in a number of States. (citations omitted) (26a).

After enunciating this test, the majority concluded that:

> 1. Because we are here dealing with a statute of general applicability that is designed to establish the prices to be paid for hospital services, which does not single out ERISA plans for special treatment, and which functions without regard to the existence of such plans, the cases which have cordoned off this area of preemption are inapplicable (25a);

> 2. We, too, have before us a generally applicable law which (1) is not intended to regulate the affairs of ERISA plans, (2) neither singles out such plans for special treatment nor predicates rights or obligations on the existence of an ERISA plan, and (3) does not have either the effect of dictating or restricting the manner in which ERISA plans structure or conduct their affairs or the effect of impairing their ability to operate simultaneously in more than one State (30a); and,
>
> 3. We are unwilling to attribute to Congress and §514 an intent to frustrate the efforts of a state, under its police power, to regulate health care costs (31a).

It is respectfully submitted that such findings ignore the facts of this case and misinterpret decisions of this Court in that:

1. The Act is not a statute of general applicability;

2. The Act, in fact, does single out ERISA Plans for special treatment;

3. The Act cannot function without regard to the existence of ERISA Plans;

4. The Act is intended to and does regulate the affairs of ERISA Plans;

5. The Act predicates rights or obligations on the existence of ERISA Plans;

6. The Act does have the effect of dictating or restricting the manner in which ERISA Plans structure or conduct their affairs and benefits;

7. The Act does have the effect of impairing the ability of ERISA Plans to operate simultaneously in more than one state;

8. While states under their police power can regulate health care costs, such regulations transgress the preemption by ERISA when the result is to establish for the states a conduit to the money held by Welfare Funds as a means of financing state social programs rather than imposing a general tax.

B. REASONS FOR ALLOWANCE OF WRIT

Granting of this Petition is appropriate on the following bases:

1. THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THIS PETITION IN THAT THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AS WELL AS DECISIONS OF COURTS IN OTHER CIRCUITS.

2. THE MAJORITY IN THE THIRD CIRCUIT WRONGFULLY FOUND THAT THE ACT IN QUESTION IS A "GENERALLY APPLICABLE STATUTE" AND IGNORED ITS DIRECT RELATIONSHIP WITH AND SUBSTANTIAL EFFECT UPON EMPLOYEE BENEFIT PLANS.

3. REVIEW BY THIS COURT IS NECESSARY TO CORRECT A SITUATION WHICH, IF LEFT AS IS, WILL EMPOWER STATES, IN THE NAME OF HEALTH CARE REFORM, TO TAP EMPLOYEE BENEFIT FUNDS AS A

SOURCE FOR MAKING UP BUDGETARY SHORTFALLS AND AVOIDING UNPOPULAR, GENERAL TAXES TO PAY FOR SOCIAL PROGRAMS – A RESULT NEVER ENVISIONED BY CONGRESS.

4. THIS APPEAL PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE DUE TO THE POTENTIAL FINANCIAL IMPACT OF THE DECISION ON ALL PARTIES.

The majority opinion below concedes that were the Act to require the ERISA Funds and their Trustees "to act in a manner inconsistent with their obligation under ERISA to apply fund assets only for the benefit of fund participants," the Act would of course be preempted as applied to the plans. It is submitted that this is precisely the case here. The granting of the Petition is appropriate.

C. LEGISLATIVE INTENT OF THE ACT DISCLOSES A SUBSTANTIAL, DIRECT IMPACT ON ERISA PLANS

The official, declared public policy of the Act is to "contain the rising costs of health care services, and to insure the financial solvency of hospitals". N.J.S.A. 26:2H-1. An analysis of the compatibility of the Act with ERISA, however, requires an inquiry beyond the "official, declared public policy" to the undeclared, actual intent and effects of the Act.

Offending features of the DRG system which prompted the finding of ERISA preemption by the District Court included the following:

1. The Act both forces the Benefit Plans to structure benefits in a particular manner and subjects the Benefit Plans to inconsistent regulations (80a). *United Wire, Health & Welfare Fund v. Morristown*, supra, at 535.

2. The charges included in the DRG rate for uncompensated care, the shortfall for Medicare, and the discounts granted to certain payors, force the Benefit Plans to incur costs for the benefit of others if the benefit plans provide benefits to cover total hospital costs (81a). *Ibid.*

3. In states in which hospital rates do not include costs for others, the Benefit Plans can abide by their express purposes. Hence, the plans are subjected to inconsistent regulations (81a). *Ibid.*

4. Because the purpose of the Benefit Plans and ERISA itself foreclosed the plans from paying DRG rates, the Participants in the plans lose any right to appeal the cost of their hospital bills (82a). *Ibid.*

5. By virtue of their status, the Benefit Plans cannot qualify for an open enrollment discount. Importantly, the Benefit Plans must subsidize the recipients of these discounts (82a). *Id.* at 536.

6. The disputed provisions affect the structure of the Benefit Plans themselves (82a). *Ibid.*

7. The offending provisions in Chapter 83 and the corresponding regulations . . . subject the Benefit Plans to "ongoing administrative hardship" (82a). *Ibid.*

In his dissent, Judge Nygaard also found that the Act "related to" employee benefit plans, and pointed to the following provisions and effects of the Act as warranting a finding of preemption:

1. The majority decision would give states free reign to spend and experiment with ERISA funds held in trust for the many workers who have labored long for their security (43a).

2. The Act includes three surcharge components for (a) uncompensated care and bad debts; (b) medicare cost shifts; and (c) costs related to discounts given to certain payor groups. Only hospital patients, not the general public, pay the three surcharge components incorporated into the DRG rate (34a).

3. ERISA Plan Participants comprise only about 15% of the hospital patients but pay about 40% of the more than $1.1 billion shortfall generated by the state-mandated cost shifts. The financial drain on ERISA funds has been enormous (37a).

4. The surcharges imposed on ERISA plans are not indirect costs associated with any hospital services to Plan Participants, they are the direct costs of hospital services rendered to other patients, which have been shifted to ERISA plans (42a).

5. Rather than spend its own general funds, New Jersey implemented a money transfer scheme where ERISA plans subsidize the medical bills of those who are favored by law. The Act provides a conduit for money from ERISA Plans to hospitals (35a).

6. ERISA Plans pay a critical role in the cost shifting mechanism of the Act to the point where without them it would fall apart. The structure of the legislative scheme

indicates in not-so-subtle ways that the New Jersey Legislature was well aware of the pivotal role ERISA plans would play (34a).

7. The state has conceded that the scheme is not "viable" without money from ERISA Plans as they "represent a major segment of the bill-paying public, to the point that it is impossible to devise a viable hospital rate setting scheme if that segment is excluded or exempted from the scheme" (35a).

8. The Act refers to or specially singles out ERISA plans in that it requires hospitals to ask patients whether they belong to a "union welfare plan" and it expressly excludes "self-funded union plans" from appealing hospital bills (36a).

9. An ERISA Plan, if it does not want to pay for the direct cost of services provided to non-beneficiaries, must "structure all its benefit payments in accordance with New Jersey (hospital rates), or adopt different payment formulae for employees inside and outside of the state" (39a).

10. Under the Act, the plans are in effect precluded from negotiating group rates because the Act takes away any incentive to negotiate when it prohibits hospitals from passing on to other patients any revenue shortfall caused by a digression from the DRG rates (43a).

11. There is a definite, palpable connection between the Act and ERISA plans in that New Jersey has asked ERISA plans to carry the brunt of the burden of keeping

hospitals financially afloat and, in fact, to largely subsidize New Jersey's venture into hospital price regulation (39a).

12. The Act refers specifically to ERISA plans, divests enormous sums of money from ERISA plans, and is predicated on the existence of ERISA plans. The financial impact and other causal effect on ERISA funds results in the conclusion that the connection between ERISA plans and the Act is not too tenuous, remote or peripheral (44a).

D. IMPROPER TAPPING OF ERISA FUNDS BY STATES DEMONSTRATES "NON-GENERAL APPLICABILITY" OF THE ACT

The dissent hit the issue squarely on the head when, in concluding, Judge Nygaard stated:

> I fear that the majority gives States free reign to spend and experiment with ERISA funds, held in trust for the many workers who have labored long for their security, in the noble pursuit of health care reform so long as states exercise a minimum degree of imagination by couching their statutes in 'generally applicable' terms.

(43a-44a). While portions of the Act may be couched in such "generally applicable" terms, the effects of the Act, and the surcharge provisions in particular, are far from general in application. ERISA plans are singled out.

In discussing the Second Circuit's Decision in *Rebaldo v. Cuomo*, 749 F. 2d 133 (2d Cir. 1984), the majority below addressed the concept of a "generally applicable" statute

which "makes no reference to, (and) functions irrespective of, the existence of an ERISA plan". *Id.* at 483 (29a) The majority went on to conclude that the Act was such a "generally applicable" law (30a).

While the majority's conclusion as to the Act being a "generally applicable" law may be warranted as to the Base Cost feature of the Act, the conclusion is totally unwarranted as to the surcharge or cost shifting aspects of the Act. In particular, the majority's conclusion ignores the following factors:

1. The Act results in additional 19.7% and 7% surcharges in uncompensated and medicare cost shifts, respectively, to commercial insurers and ERISA Plans. The surcharges are not equitably distributed to the general population, or to the state, or to even hospital users, but are placed squarely on the shoulders of commercial insurers and ERISA Plans;

2. The Act disproportionately impacts ERISA Plans which have paid the lion's share of caring for the uninsured. ERISA Plan participants comprise only about 15% of the hospital patients, but pay about 40% of the more than $1.1 billion shortfall generated by the state-mandated cost shifts;

3. The Act has an effect of dictating or restricting the choices of ERISA Plans with regard to their benefits;

4. The Act in effect precludes ERISA Plans from negotiating group rates;

5. The Act expressly excludes "self-funded union" plans from the right to appeal a correct but excessive

charge which appeal right is available to individual patients only.

A direct result of the decision will be to make it open season on ERISA funds as a means of easing states' budgetary crunches or avoiding unpopular, new general taxes so long as states merely couch their laws in "generally applicable" terms. New Jersey unquestionably viewed ERISA Plans as ripe for picking, and deliberately set upon a course of action designed to tap this source of money. The Act in its purpose and effect is far from a "generally applicable" law. It is a law directed squarely at ERISA Plans and their funds in a manner Congress never intended to permit.

It is almost inconceivable that upon examination of the true purposes and impacts of the Act that one could conclude, as did the majority, that the effect of the Act on employee benefits plans is "too tenuous, remote or peripheral". Such conclusion flies in the face of all of the factors cited above.

E. THE MAJORITY OPINION CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER CIRCUITS

In its preemption analysis, the majority found as "the most helpful case in the present context" the Second Circuit's Decision in *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984). While agreeing that a portion of the *Rebaldo* court's analysis was rejected by this Court in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), the majority found the *Rebaldo* analysis relating to the "indirect economic impact" of a "state statute of general application"

as persuasive. The majority stated that it was unpersuaded by the recent opinion in *Travelers Insurance Co. v. Cuomo*, 813 F.Supp. 995 (S.D.N.Y. 1993) where the District Court found that *Rebaldo* had been abrogated by later Supreme Court cases, specifically *Ingersoll-Rand Co. v. McClendon*, supra, *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

The Supreme Court in *Ingersoll-Rand* expressly rejected the argument which was accepted in *Rebaldo* that Section 514 of ERISA preempts only a state law which "purports to regulate . . . directly or indirectly, the terms and conditions of employee benefit plans." While recognizing the effect of *Ingersoll-Rand* on the vitality of the *Rebaldo* decision, the majority continued to rely upon the so-called "traditional state police power analysis" of *Rebaldo* which analysis has subsequently been rejected by the Second Circuit itself in *General Electric Co. v. New York State Dept. of Labor*, 891 F.2d 25 (2nd Cir. 1989). There, although the court was faced with a law which was a "generally applicable" statute involving an area of traditional state police power in the area of labor costs and working conditions, the Second Circuit found that the statute was preempted because of its indirect burden on ERISA plans in the form of increased costs as well as the administrative burden of additional record keeping. This "state police power" reasoning of the *Rebaldo* court was also rejected in *Travelers Ins. Co. v. Cuomo*, 813 F. Supp. 996 (S.D.N.Y. 1993) and *United States Health Services, Inc. v. Upstate Administrative Services*, 578 N.Y.S. 2d 801 (Sup. Ct. 1991).

The majority's reliance upon a decision which, at best, is of doubtful reliability calls upon this Court to resolve this issue.

F. SUMMARY

Although unquestionably couched in terms of general applicability, the purpose and effect of the Act is far from general. While in certain respects, the ERISA Plans stand on even ground with all hospital users, at no time are they treated the same as the general public in terms of financing the objects of the surcharges, i.e., (1) uncompensated care and bad debts; (2) medicare cost shifts; and (3) costs related to discounts given to other payor groups.

In other respects, the ERISA Plans together with commercial insurers are treated in a manner different than any other hospital user, i.e, (1) screening of patients to determine coverage by a commercial insurer or "union welfare plan"; and (2) denial of any right to appeal assignment of a DRG as excessive. In still another respect, the ERISA Plans are segregated even from the commercial insurers as to the ability to negotiate group rates or discounts.

A statutory scheme with such effects can in no way be considered to be "generally applicable" nor as having a minimal effect on ERISA plans. Clearly, moreover, the effects on ERISA Plans are not unintended by the state. When ERISA Plan Participants, who comprise only about 15% of the hospital patients, pay about 40% of the more than $1.1 billion shortfall generated by the state-mandated cost shifts, the Act is intended to regulate the affairs of ERISA plans by drawing upon employee benefit

funds which ERISA is designed to protect, rather than the state's general revenues or the public at large. Such discrepancy in treatment establishes that ERISA plans are singled out under the Act. The Act further has a direct and significant effect upon how ERISA plans structure their benefits. These factors together with the direct, enormous financial impact on ERISA plans lead to the inevitable conclusion that the Act "relates to" ERISA Plans and is preempted.

CONCLUSION

Based upon the foregoing it is respectfully submitted that the Court grant the within Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Dated: August 6, 1993

Respectfully submitted,

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Supreme Court, U.S.
SEP 28 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

NYSA-ILA WELFARE FUND, *et al.*,

Petitioners,

vs.

FRANCIS J. DUNSTON, in her capacity as NEW JERSEY COMMISSIONER OF HEALTH, *et al.*,

Respondents.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY HOSPITAL ASSOCIATION AND THE RESPONDENT HOSPITALS

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* Case captions for additional petitions are referenced on inside front cover.

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NEW JERSEY CARPENTERS WELFARE FUND, *et al.*,

Petitioners,

vs.

FRANCES J. DUNSTON, in her capacity as NEW JERSEY COMMISSIONER OF HEALTH, *et al.*,

Respondents.

TRUSTEES OF THE WELFARE TRUST FUND, LOCAL UNION NO. 475, *et al.*,

Petitioners,

vs.

FRANCES J. DUNSTON, in her capacity as NEW JERSEY COMMISSIONER OF HEALTH, *et al.*,

Respondents.

UNITED WIRE, METAL & MACHINE HEALTH AND WELFARE FUND, *et al.*,

Petitioners,

vs.

MORRISTOWN MEMORIAL HOSPITAL, *et al.*,

Respondents.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly applied this Court's prior precedents in holding that a generally applicable hospital rate setting statute which is not intended to regulate the conduct of self-insured employee benefit plans, does not single out such plans for special treatment, does not predicate rights and obligations upon the existence of such plans and does not dictate or restrict the manner in which such plans administer their affairs, is not preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

2. Whether the Court of Appeals correctly applied this Court's prior precedents in holding that a generally applicable hospital rate setting statute which adjusts the benefits and burdens of economic life to promote the common good, does not impact upon plan participants in an inappropriate way and which constitutes a continuation of New Jersey's long standing regulation of health care matters, does not cause a taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution.

PARTIES TO THE PROCEEDINGS

All parties to these proceedings appear in the caption of the decision of the United States Court of Appeals for the Third Circuit, which is contained in petitioners' appendix at pages A-1 through A-5. Because of the large number of parties, the list will not be reproduced herein. In accordance with Supreme Court Rule 29.1, a list of the respondents' parent corporations and subsidiary corporations that are not wholly owned is reproduced in the appendix to this brief.

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STATEMENT OF THE CASE

This case involves the issue of whether certain components of New Jersey's comprehensive statutory scheme governing hospital rate setting are preempted by ERISA, 29 U.S.C. § 1001, *et seq.*, or create an unlawful taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

A. Hospital Rate-Setting in New Jersey

New Jersey's Health Care Facilities Planning Act, N.J.S.A. 26:2H-1, *et seq.* (the "Act") was enacted by the New Jersey Legislature in 1971.[1] The declared public policy underlying the Act was:

> that hospital and related health care services of the highest quality, of demonstrated need, efficiently provided and properly utilized at a reasonable cost are of vital concern to the public health.

N.J.S.A. 26:2H-1 (1992).[2] (Respondents' Appendix, *infra*, at A-8). In order to attain cost-containment and efficiency, the Act authorized the Commissioner of the New Jersey Department of

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1. On November 30, 1992, the Legislature enacted the Health Care Reform Act of 1992, L. 1992, ch. 160. As a result of this legislation, the State of New Jersey no longer regulates the establishment of hospital rates. While the specific statutory provisions challenged herein have been superseded, petitioners seek restitution of monies paid while those provisions were in effect, and many hospitals have not been paid in full for services rendered pending the final outcome of this litigation. As a result, the Court of Appeals determined that this case was not moot.

2. Pertinent sections of the Act have been reproduced in respondents' appendix.

Health (the "Commissioner") to regulate certain costs of health care services, including the establishment of hospital rates. N.J.S.A. 26:2H-5, 26:2H-18, and 26:2H-18.1 (1992) (Resp. A-15-23).

As originally enacted in 1971, the Act authorized the Commissioner to set hospital rates only for individuals whose care was paid for by Blue Cross and certain governmental programs, such as Medicaid. L. 1971, c. 136, § 18. (Resp. A-23-24). The rates were based on the actual cost of services provided by hospitals, a method which furnished only limited incentives to improve efficiencies in hospital operation. Under the 1971 Act, the state had no authority over the rates that hospitals charged patients who had private insurance coverage or the uninsured. Consequently, these groups sometimes paid higher rates for the same services. *See generally Borland v. Bayonne Hospital,* 72 N.J. 152, 159 (1977), *cert. denied,* 434 U.S. 817 (1977).

In order to achieve greater control over the increasing cost of hospital services, reduce the disparity in rates charged to patients whose care was fully or partially paid for by different payors, and alleviate the financial burden on hospitals serving indigent patients, the New Jersey Legislature amended the Act by establishing a new system of hospital rate-setting controlling charges to all patients receiving hospital services. L. 1978, c. 83.[3] Unlike the former system, Chapter 83 applied to all payors, not just to individuals whose care was paid for by Blue Cross and Medicaid. Chapter 83 contained an express recital that cost containment was a stated objective of the Act. N.J.S.A. 26:2H-1 (1992). (Resp. A-8). The statute also had an express goal of promoting the fiscal solvency of hospitals. *Id.* Administration of the new rate-setting system was delegated to the New Jersey Department of Health ("DOH").

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3. These amendments have become known as "Chapter 83".

The rate-setting system set a prospective rate of reimbursement, in advance of actual treatment, which was a blend of the statewide mean/standard costs developed by looking at the resources consumed by the industry as a whole and the hospital-specific resources and costs consumed in treating particular illnesses, categorized as diagnosis related groups ("DRG"). N.J.A.C. 8:31B-5.1. Each DRG reflected a wide variety of both direct and indirect patient care costs. N.J.A.C. 8:31B-3.4. These costs were derived from actual costs incurred by all acute care hospitals during a particular base year, as updated for inflation and certain other factors. N.J.A.C. 8:31B-2.5.[4] The quantification of these costs into certain "financial elements" were used to develop each hospital's "preliminary cost base" and schedule of rates. N.J.A.C. 8:31B-3.16.

The "preliminary cost base" was defined as that portion of a hospital's actual, current costs which may reasonably be required to be reimbursed to a properly utilized hospital for the efficient and effective delivery of appropriate and necessary health care services of high quality required by such hospital's mix of patients. N.J.S.A. 26:2H-2.k (1992). (Resp. A-11). Each hospital received a blend of its own costs and the mean/standard costs developed by looking at the hospital industry as a whole. N.J.A.C. 8:31B-3.5. Direct patient care costs in excess of the blend of the hospital's own costs and the mean/standard costs were "disincentives" which were excluded from a hospital's rates. Where, however, a hospital's costs were below the standard, the hospital nevertheless

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4. In employing a DRG-based methodology, New Jersey's hospital rate-setting system was similar to the hospital reimbursement system employed by the Medicare program. Indeed, Medicare's DRG-based methodology was developed as a result of a review of demonstration projects employing this methodology undertaken by the States of New Jersey and New York under the authority of the Secretary of the U.S. Department of Health and Human Services. *See* H.R. Rep. No. 25, 98th Cong., 1st Sess. 145, *reprinted in* 1983 U.S. Code Cong. & Ad. News 143, 364.

received a proportion of the standard costs, thereby gaining an increase or "incentive" in its rates. N.J.A.C. 8:31B-3.23(a).

The prospective nature of the rate-setting system and its reliance on illness-related diagnosis related groups precluded the establishment of rates that relied on a particular individual's length of stay, treatment and consumption of resources. For example, if a patient was admitted for an appendectomy, a hospital could only charge the patient the amount approved for the DRG classification of appendectomy, and not the actual cost of all services provided to the patient. Thus, the amount approved for a DRG classification could actually be lower or higher than the actual cost of the services that the patient received.

Each hospital's schedule of rates, defined as the amount which each hospital was permitted to charge per DRG, was approved by New Jersey's Hospital Rate Setting Commission ("HRSC"), at a level sufficient to generate the amount of revenue required to cover the revenue requirements of the preliminary cost base.

1. Uncompensated Care

Among the costs of doing business incurred by hospitals operating within New Jersey are costs associated with the provision of services to individuals who are unable to pay. These costs are known as uncompensated care costs, incurred as a result of a statutory requirement which specified that "access to quality health care shall not be denied to residents of the state because of their inability to pay for the care." L. 1991, c. 183, § 1. (Resp. A-24-25). Federal law similarly requires treatment of such patients. Under 42 U.S.C. § 1395dd, hospitals must treat and stabilize individuals in need of emergency care and women in active labor regardless of whether or not they can pay. In addition, a state licensure standard, N.J.A.C. 8:43G-5.2(c), specifies that hospitals "shall not deny admission to patients on the basis of their inability

to pay", while N.J.A.C. 8:43G-4.1(a)2 requires every New Jersey hospital patient be accorded the right to "treatment and medical services without discrimination based on race, age . . . ability to pay, or source of payment."

When Chapter 83 was originally enacted, uncompensated care costs which a particular hospital incurred were borne entirely by that particular hospital's patients. Each hospital factored in uncompensated care costs as a component of its rates in order to meet this cost of doing business. As a result, hospitals serving a large population of indigent patients were forced to charge significantly higher rates than hospitals providing less uncompensated care. The provision of a high proportion of uncompensated care threatened the financial stability of hospitals with high uncompensated care case loads.

New Jersey's hospital reimbursement system sought to alleviate the financial burdens imposed on hospitals through their provision of unreimbursed care by requiring the cost of providing such care to be considered in hospital rates charged to all patients. Thus, N.J.S.A. 26:2H-18.d expressly provided that the reasonable costs of hospital services to indigent patients and bad debts were mandatory financial elements of a hospital's preliminary cost base which were to be included in the rates charged to all non-federal payors. (Resp. A-20).

Monies utilized to reimburse hospitals for the provision of uncompensated care were collected through the imposition of a uniform charge which was added to each patient's hospital bill. The uniform charge amounts collected from all patients were then remitted by the hospitals to a Trust Fund. All monies remitted to the Fund were appropriated to the state Medicaid agency, which would then reimburse hospitals for the amount of uncompensated care that they actually provided.

2. The Medicare Cost Shift

Under N.J.S.A. 26:2H-18.1.c. (1992) (Resp. A-22), hospital rates were also permitted to account for adjustments that resulted from statutes and regulations affecting the delivery of health care. Such adjustments were required to take into account the effectiveness and efficiency of the health care delivery system as a whole. The federal Medicare program does not pay the same rates as were provided for under the New Jersey DRG reimbursement system, since Medicare payment rates are established under a separate federal statutory scheme. *See* 42 U.S.C. § 1395c *et seq.* Accordingly, DOH created adjustments in the rates paid by non-Medicare patients to account for the shortfall between what Medicare would pay and the New Jersey DRG rate. N.J.A.C. 8:31B-3.73. This was known as the "Medicare cost shift."

3. Payor Differentials

The HRSC was also permitted to grant differentials in payment rates to a payor or class of payors. N.J.S.A. 26:2H-18.b (1992) (Resp. A-18-19). If the HRSC granted a payor differential, it had to be supported by evidence of "quantifiable economic benefits rendered to the institution or to the health care delivery system taken as a whole." Under the authority of this provision, a differential from the DRG rate was accorded to patients who had health benefits coverage through certain payors, such as Blue Cross and Blue Shield, as a result of the financial benefits to society which are provided by the open enrollment programs offered by such payors. The differentials were allocated among patients covered by all payors other than Medicare so that a hospital received from all payors net revenue equal to its preliminary cost base.

B. ERISA Preemption

The Employee Retirement Income Security Act, popularly

known as ERISA, 29 U.S.C. § 1001, *et seq.*, was enacted in 1974. The subject of the ERISA statute is pension benefit plans and employee benefit plans. ERISA contains a preemption clause which provides that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" which is covered by ERISA. 29 U.S.C. § 1144(a).[5] The statute defines the term "state" to include any political subdivision, agency or instrumentality of a state, while state law was defined to include all laws, decisions, rules or regulations or other state action having the effect of law. 29 U.S.C. §§ 1144(c)(1), 1144(c)(2).

C. Decisions Below

Commencing in 1990 and continuing through the first half of 1992, over a dozen self-insured employee benefit plans ("the Plans") and a number of individual Plan participants commenced a series of civil actions (later consolidated) against the State of New Jersey and most of the state's acute care hospitals seeking an injunction against the application to them of New Jersey's hospital rate setting statute. The Plans and their participants alleged that certain provisions of the statutes and regulations applicable to hospital rate setting were preempted by ERISA, denied the Plans and their participants due process and equal protection under the New Jersey and United States Constitutions, violated the Fifth Amendment of the United States Constitution by creating a taking of property without just compensation, and created an unlawful tax and delegation of taxing authority. In particular, the Plans challenged the inclusion in hospital rates of: (1) the uncompensated care add-on; (2) the Medicare cost shift; and (3) payor differentials.

On May 27, 1992, the District Court issued an Opinion and Order which provided for the entry of a permanent injunction

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5. This provision is also referred to as Section 514(a).

against the state defendants. (Pet. A-64-95). The District Court enjoined enforcement of New Jersey's hospital rate setting statute and regulations to the extent that they allowed for the inclusion in hospital rates charged to ERISA-covered plan participants of costs attributable to the provision of uncompensated care, the Medicare cost shift and payor differentials. While the court acknowledged that no court had extended ERISA preemption to the extent of its opinion, the court found that New Jersey's hospital rate setting statute "related to" ERISA plans, even though the statute did "not mention benefit plans directly and [did] not regulate the terms and conditions of any such plans explicitly". (Pet. A-80). The court rejected the plans' constitutional claims. (Pet.A-85-92). The injunction was stayed pending appeal. (Pet. A-19).

On May 14, 1993, the Court of Appeals reversed the decision of the District Court. (Pet. A-1-61). The Court of Appeals concluded that New Jersey's hospital rate setting law constituted a generally applicable law which (1) is not intended to regulate the affairs of ERISA plans; (2) neither singles out such plans for special treatment nor predicates rights or obligations on the existence of an ERISA plan; and (3) does not have the effect of either dictating or restricting the manner in which ERISA plans structure or conduct their affairs or impairing their ability to operate simultaneously in more than one state. The Court of Appeals expressed an unwillingness "to attribute to Congress and Section 514 an intent to frustrate the efforts of the State, under its police power, to regulate health care costs." The court concluded that it had found no case that had held a law fitting the characteristics of the New Jersey hospital rate setting statute to be preempted by ERISA, and it would decline to so hold. (Pet. A-30).

The Third Circuit also soundly rejected the Plans' claims that the challenged costs did not constitute an unlawful taking of property without just compensation and affirmed the District Court's summary judgment for the defendants as to the Plans'

constitutional claims.[6] (Pet. A-22-23).

REASONS FOR DENYING THE WRIT

I.

REVIEW BY THIS COURT IS NOT AVAILABLE BECAUSE THE COURT OF APPEALS HAS NOT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Under Rule 10.1(c) of the Rules of the Supreme Court, a Petition for a Writ of Certiorari may be granted if a United States Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court. No such conflict has occurred as a result of the Third Circuit's decision in *United Wire*. Petitioners' efforts to convince this Court otherwise misconstrues the Court's earlier, consistent holdings that only state statutes which impact on ERISA benefit plans, not plan benefits or plan beneficiaries, are subject to preemption by ERISA.

Under ERISA preemption analysis, a law "relates to" an employee benefit plan if it has a connection with or reference to such a plan. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983). A state law that either directly or indirectly refers to, or otherwise attempts to or succeeds in regulating or interfering in the administration of employee benefit plans, relates to ERISA and is preempted. *Fort Halifax Packing Company, Inc. v. Coyne*, 482 U.S. 1, 7-8 (1987). As recently as last term, however, this Court reiterated that preemption does not occur if a state law has only a "tenuous, remote or peripheral connection with covered plans, . . . as is the case with many laws of general applicability." *District of*

6. Petitioners' equal protection, due process and tax law claims were neither raised nor considered on appeal.

Columbia v. Greater Washington Board of Trade, 113 S. Ct. 580, 583 n. 1 (1992). *See also Ingersoll- Rand v. McClendon,* 498 U.S. 133, 139 (1990); *Shaw,* 463 U.S. at 100, n. 21.

Under the plain language of the statute and this Court's precedents, there *must* be a nexus between the ERISA-covered plan and the state statute, regulation or cause of action being challenged. In the absence of such a nexus, there can be no finding of ERISA preemption. For example, in *Fort Halifax,* this Court declined to find preemption of a Maine statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing. As the Court noted, a crucial feature of ERISA's preemption provision is its deliberate use of the term "employee benefit plan." While the appellants in *Fort Halifax* argued that any state law pertaining to an employee benefit listed in ERISA necessarily regulates an employee benefit plan, the Court rejected this distinction, finding the choice of words employed by Congress to be deliberate:

> Nothing in our case law, however, supports appellant's position that the word "plan" should in effect be read out of the statute . . . The words "benefit" and "plan" are used separately throughout ERISA, and nowhere in the statute are they treated as the equivalent of one another. Given the basic difference between a "benefit" and a "plan", Congress' choice of language is significant in its preemption of only the latter.

Fort Halifax, 482 U.S. at 8. Similarly, in *Mackey v. Lanier Collection Agency,* 486 U.S. 825 (1988), this Court refused to find George's general garnishment statute to be preempted, even though the statute at issue prevented plan participants from receiving their benefits and even though complying with garnishment orders might burden the administration of the plan.

In *Ingersoll-Rand Company v. McClendon*, 498 U.S. 133 (1990), this Court considered a state cause of action which allowed former employees to bring wrongful discharge suits based upon the fact that the alleged reason for discharge was a desire not to make payments to the employee out of an employee benefit plan. Although the Court concluded that the state cause of action was preempted by ERISA, the Court nevertheless reiterated that there are limits to ERISA preemption. The Court reaffirmed its earlier determination in *Fort Halifax* that under the plain language of the ERISA statute, only state laws that relate to benefit *plans* are preempted. *Ingersoll-Rand*, 498 U.S. at 139. The Court also noted that under its decision in *Mackey*, the fact that collection might burden the administration of a plan did not, by itself, compel preemption. In finding that the state cause of action considered in *Ingersoll-Rand* was preempted by ERISA, the Court drew the following distinction between laws that are preempted by ERISA and those that are not:

> We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan, nor is the cost of defending this lawsuit a mere administrative burden. Here, the existence of a pension plan is a critical factor in establishing liability under the state's wrongful discharge law.

Id. at 139-140. Thus, the Court did not retreat from its earlier holdings that ERISA preemption is not without limits and that laws which operate irrespective of the existence of ERISA plans can survive a preemption challenge.

The Third Circuit's decision is entirely consistent with this Court's prior decisions regarding the scope of ERISA preemption. The court analyzed the impact that New Jersey's rate setting statute had on ERISA plans and concluded that the requisite nexus

between the challenged statute and the plans was lacking in this case. This was entirely appropriate, since all that New Jersey's hospital rate setting scheme did was to establish a methodology of setting hospital rates which calculated the price charged to hospital patients for the services that they received irrespective of whether or not they possessed health benefits coverage.[7] As the Third Circuit correctly found, New Jersey's hospital rate setting statute never dictated what an employee benefit plan must pay, and did not require ERISA plans to cover a plan participant's total hospital costs. Under the statutory and regulatory scheme, plans remained free to set their benefit levels without any reference to the state-regulated DRG rate, and were free to pay whatever portion of an individual's hospital bill they deemed appropriate.[8] While the rate-setting system did impact upon the price for hospital services paid by plan participants, the system did not impose any requirements on the plan itself.

Petitioners argue that there is a direct impact on the plan because of the economic impact that payment of the challenged

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7. Even individuals who were uninsured had amounts attributable to uncompensated care, the Medicare cost shift and payor differentials included in the rates they were charged by hospitals.

8. The provision of uncompensated care originates in part from federal requirements specifying that hospitals must provide indigent care. 42 U.S.C. § 1395dd mandates hospitals to treat and stabilize individuals experiencing emergency conditions (including women in active labor) irrespective of their ability to pay. In addition, regulations under the federal Hill-Burton program preclude hospitals receiving Hill-Burton funding from denying emergency services to persons residing in the facility's service area due to an inability to pay. *See* 42 C.F.R. § 124.603. The uncompensated care add-on represented a mechanism developed by the state to compensate hospitals for the costs of providing these services. It would be inconsistent to find that one federal law would preclude hospitals from recovering revenues needed to comply with the requirement that they provide uncompensated care at the same time that another federal law mandates that hospitals provide such care.

add-ons had on the plan and plan participants. This overlooks the fact that this Court has never found a statute to be preempted simply because it increases the price paid by plan participants for a particular commodity.[9]

Petitioners' analysis reflects a fundamental misunderstanding of the mechanics of setting a price for hospital services. The cost of providing uncompensated care and of discounts provided to certain payors is no different from any other type of cost that hospitals incur. As the Third Circuit accurately observed, a state's imposition of this cost of doing business is:

> No different in kind, however, from any state regulation that increases the cost of goods or services that hospitals consume and pass on in hospital costs, i.e. utility costs, the wages of its employees, waste disposal costs, etc.

(Pet. A-26). In this regard, hospitals function just like any other business, where prices established include not only operating expenses but sufficient markup to cover theft, spoilage and discounts provided to wholesale customers or during promotional events. The payment of these costs does not constitute a payment for the benefit of others, as petitioners allege, but merely represents reimbursement to the hospitals to cover their costs of doing business.

The fact that compliance with a state statute might indirectly increase plan costs was held not to be a sufficient ground for

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9. Petitioners assert that New Jersey's statute thwarted the express purpose of their plans because many plans have a purpose of paying 100% of a participant's hospital bill. While this is a laudable goal, the State cannot be required to set hospital rates at a level that will permit third party payors to cover the full amount of a patient's bill. The issue raised by petitioners is an economic issue, not an ERISA preemption issue.

preemption in this Court's earlier decision in *Mackey*, where a Georgia garnishment law was found not to be preempted by ERISA despite the fact that "substantial administrative burdens and costs" were incurred by the plans in complying the statute. *Mackey*, 486 U.S. at 831-32. Given the result in *Mackey*, the Third Circuit's conclusion that New Jersey's statute is not preempted despite the fact that it may increase the charges billed to ERISA plan participants for hospital services is entirely consistent with this Court's prior decisions in this area.

No hospital bill purports to represent the actual cost of treating a particular individual. There are many types of costs incurred by hospitals that must be passed on to their patients which do not necessarily relate to the specific resources that the particular patient consumes. For example, hospital rates include amounts attributable to capital costs incurred by hospitals for improvements to a hospital facility. If a hospital constructs a pediatrics wing, it can include some of the costs attributable to this construction and the debt service payments associated with it in its rates. Thus, a 45 year old hospitalized for knee surgery may be paying a small portion of the costs attributable to the construction of a new pediatrics wing in his rates, even though this individual would not receive any services in that wing. The Third Circuit concluded that it is impossible for hospitals to set their prices in such a way as to only provide a bill for the specific services rendered to an individual patient. (Pet.A-31). This conclusion does not conflict with any prior decision by this Court. Nothing in this Court's earlier decisions can be read as standing for the proposition that ERISA plan participants may only be required to pay those components of a price which relate specifically to identifiable goods and services actually consumed by the plan participant.

The petitioners candidly admit that they do not challenge the underlying DRG reimbursement feature of New Jersey's hospital reimbursement statute, an admission that is fraught with an inherent and obvious contradiction. Under the DRG system, a

price was set for a particular type of service irrespective of the length of time that the patient stays in the hospital. Thus, a patient hospitalized for an appendectomy would receive the same bill irrespective of whether the patient stayed in the hospital 2, 4 or 6 days, absent any complicating factors which would have justified an additional payment. Because this system is based on an average cost per case, and not the actual cost incurred by a particular patient, utilization of a DRG system means that all patients will have costs included in their hospital rates which are attributable to others. Indeed, participants in the petitioners' plans directly benefited from this system of averages if they stayed in the hospital longer than the average period of time for a particular DRG, since the DRG would be calculated based upon a review of the costs associated with the average number of days of hospitalization for that illness. The very foundation of a DRG-based system is the provision of positive and negative incentives for hospitals to reduce costs. Petitioners cannot be permitted to selectively retain the benefits of the state's efforts to make health care affordable, while avoiding any perceived burdens in participating in the system. In either case, the State's pricing structure affects the relationship between the hospital and the plan participant, not the relationship between the hospital and the plan.

Petitioners assert that they are forced to subject their plan to conflicting forms of administration and that they are forced to abide by inconsistent regulations. However, the record is devoid of any evidence that hospital rates are uniform among all other states, and that New Jersey is somehow unique. The cause of the administrative difficulties and inconsistencies referenced by petitioners does *not* flow from the peculiar features of New Jersey's hospital rate setting system, but the fact that hospital prices can vary substantially among different states, or even within different geographic regions of a particular state. Hospital rates will, of necessity, be affected by such varying factors as differences in wage costs, as well as differences in the price of purchasing the commodities used by hospitals. As the Third Circuit

noted, the petitioners would always be subject to these inherent inconsistencies, regardless of the nature of the reimbursement system utilized or the components contained therein.

The petitioners' flawed analysis also overlooks the fact that the challenged components of the DRG rate are components of hospital rates in all states, not just New Jersey. Several other states which regulate hospital rate-setting include the cost of providing uncompensated care in the rates. *See, e.g.*, N.Y.P.H.L. § 2807-c. The Third Circuit's conclusion that state regulation of hospital pricing is not likely to make interstate operation of an ERISA plan more difficult is entirely consistent with this Court's prior decisions. This Court has never held that either ERISA-covered plans or their participants must be permitted to pay the same price for a particular service in different states, even though there may be legitimate reasons for prices varying from one state to another. Hospitals which set their own rates in a non-regulated setting include costs attributable to charity care, bad debt, Medicare shortfalls and payor discounts in their rates as costs of doing business. Indeed, the District Court acknowledged this by stating that "Even if New Jersey did not enact Chapter 83, hospitals would still charge plaintiffs for uncompensated care . . . so that they could comply with their statutory obligations to provide hospital care for everyone regardless of that person's ability to pay." (Pet.A-92). It defies logic to suggest that costs which would normally be included in hospital charges in the absence of state regulation cannot be included in the rates charged to ERISA plan participants if the same costs are established pursuant to state statute. To find New Jersey's system to be preempted by ERISA would raise a serious question regarding the ability of a state to take *any* action regarding regulation of hospital rates, since the mere action of setting rates which will be paid by participants in ERISA-covered plans could arguably cause such plans to structure benefits in a particular manner.

Petitioners assert that because the statute includes a reference

to "union welfare plan identification cards", the statute expressly references ERISA plans and is therefore preempted. The reference in question simply provides that a hospital shall not be reimbursed for the cost of providing uncompensated care unless it interviews each patient admitted to determine whether the patient is covered by health insurance, as documented by such items as "a union welfare plan identification card or claim form." N.J.S.A. 26:2H-18.31. All that the statute does is require verification of whether third party insurance is available to pay all or part of a patient's bill. It does not regulate the amount of coverage or set the rate that must be paid, and does not impose any additional burdens upon plan administrators. In short, this provision causes no impact on the plan at all, whether direct or indirect. Thus, as the Third Circuit correctly found, this reference should be regarded as without legal consequence for preemption purposes, and is therefore distinguishable from the references contained in the statutes analyzed by this Court in its *FMC* and *District of Columbia* decisions.[10]

Petitioners also contend that their participants derived no benefit from the existence of the challenged components in New Jersey's hospital rates and that their participants bore a disproportionate share of the burden in covering these costs. It is not true that plan participants derived no benefit from inclusion of these costs in hospital rates. Without coverage of these legitimate business costs, hospitals could not survive. Therefore, plan participants did derive a direct benefit from these costs because payment of these costs helped to provide hospitals with sufficient cash flow to keep their doors open.

New Jersey's hospital rate setting statute did place a large

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10. The references to self-funded union plans in the Department of Health's Patient Appeal Policy also should not result in a finding of preemption. The Patient Appeal Policy does not regulate the plans or the rates they are charged, or cause any impact on the plan administrator.

share of the burden of paying for uncompensated care upon individuals who have the resources to pay for such care. However, while the fact that individuals who pay for hospital services bear a larger share of the overall cost of providing such services may be unfair or debatable from a social policy point of view, this does not give rise to a violation of ERISA. Plainly, ERISA does not address the rights of plan participants as consumers. As this Court has repeatedly held, the only impact the ERISA preemption provision is concerned with is the impact that a statute or a state cause of action has on the plan itself. The Third Circuit's decision is, therefore, in full accord with this Court's prior decisions respecting ERISA preemption, since the Third Circuit concluded that any impact on the plan itself, a necessary prerequisite to a finding of ERISA preemption, was absent here.

II.

THE THIRD CIRUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS.

Under Supreme Court Rule 10.1(a), this Court may exercise its discretion and grant a Petition for a Writ of Certiorari when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter. The requisite conflict between the Circuits is lacking in this case. The only Court of Appeals decision to address an issue similar to those present in this case was *Rebaldo v. Cuomo*, 749 F.2d 133 (2nd Cir. 1984), a case whose reasoning was followed by the Third Circuit in reaching its decision in *United Wire*. While petitioners may seek to characterize other cases as being in conflict with the decision of the Third Circuit, these cases are either trial court decisions or deal with different issues and, therefore, do not create a direct conflict.

Rebaldo is the only Court of Appeals decision which deals

with the issue of ERISA preemption in the context of a review of a hospital rate setting statute. The statute at issue in *Rebaldo* prohibited hospitals from establishing inpatient charges for self-insured employee benefit plans that were different than the charges authorized by a state statute. The Second Circuit sustained the New York statute against an ERISA preemption challenge. The Second Circuit's decision in *Rebaldo* was premised upon two findings: (1) that a state statute cannot be found to be preempted by ERISA unless it "purports to regulate the terms and conditions of an employee benefit plan" and (2) that a state statute which constitutes a generally applicable exercise of a state's police powers should not be found preempted by ERISA if it only affects a plan in a tenuous, peripheral or remote manner. The Third Circuit followed the second prong of the *Rebaldo* court's analysis. Thus, there is uniformity among the circuits with respect to the issue of whether a generally applicable hospital rate-setting statute should be viewed as preempted by ERISA.

Petitioners attempt to gloss over the fact that no conflict between the circuits is present here by arguing that the decision in *Rebaldo* has been effectively overruled by subsequent decisions of this Court and other lower courts. *Rebaldo* and *United Wire* are the only circuit court decisions dealing specifically with the issue of whether a generally applicable hospital rate setting statute is preempted by ERISA. Even if it were assumed for the sake of argument that *Rebaldo* was no longer good law, all that this would mean is that *United Wire* would stand on its own as the only Court of Appeals decision dealing with this particular issue. Thus, the requisite conflict between the circuits would still be lacking.

Moreover, the portion of the *Rebaldo* decision upon which the Third Circuit relied has not been overruled. The *Rebaldo* court's first rationale for finding no preemption has been narrowed by this Court's decision in *Ingersoll-Rand,* which held that a state cause of action which was predicated on the existence of an employee benefit plan could be preempted even if it did not purport to

regulate the terms and conditions of ERISA plans. However, the Supreme Court has not overruled the second and more important prong of the Second Circuit's analysis in *Rebaldo*. The state cause of action at issue in *Ingersoll-Rand* was not a generally applicable law which functioned irrespective of the existence of an ERISA plan. Indeed, both in *Ingersoll-Rand* and the more recent *District of Columbia* decision, this Court was careful to make an express note of the fact that it was *not* dealing with a generally applicable statute which affected a plan in a "tenuous, remote or peripheral" manner. Thus, *Rebaldo* has not been overruled by subsequent decisions of this Court.

The portion of the *Rebaldo* holding relied on by the Third Circuit has also never been overruled by the Second Circuit. In *Aetna Life Insurance Company v. Borges*, 869 F.2d 142 (2nd Cir. 1989), *cert. denied*, 493 U.S. 811 (1989), the Second Circuit reaffirmed this portion of its *Rebaldo* holding. While there is a footnote in the Second Circuit's decision in *Smith v. Dunham- Bush Inc.*, 959 F.2d 6, 9 n.3 (2nd Cir. 1992) referencing *Rebaldo*, the Court noted only that *Rebaldo* could no longer be invoked for the proposition that a state law is preempted "only if it relates to and *purports to regulate an ERISA plan*." (Emphasis in original). However, the court in *Smith* never addressed *Rebaldo's* holding that a generally applicable state law cannot be preempted if its relationship with an ERISA plan is too tenuous, remote or peripheral to satisfy the "relate to" test.

Petitioners attempt to create a conflict between the circuits where none exist by arguing that several courts have found state laws to be preempted even where they can be categorized as generally applicable state laws involving an exercise of the state's police powers. These cases do not involve an exercise of the state's police power to regulate health care matters, and while the statutes analyzed in these other cases were generally applicable exercises of the state's police power, they had a concrete and direct impact on the plan. Thus, the decisions in these cases have not overruled the

portion of the *Rebaldo* decision relied on by the Third Circuit, and do not create a conflict either with *Rebaldo* or with the Third Circuit's decision in *United Wire*.

For example, in *General Electric v. Department of Labor*, 891 F.2d 25 (2d Cir. 1989), the Second Circuit held that a state law which required an employer to either bring the cost of its prescribed benefits into equivalence with the cost of local prevailing benefits or to pay the additional cost directly to employees was preempted by ERISA. However, while a labor law could be characterized as a generally applicable exercise of the state's police powers, the majority opinion in *General Electric* did not analyze the statute's status as such a law. Moreover, the law's affect on the plan was neither tenuous nor remote, because the plan was specifically told that it either had to pay benefits or maintain detailed records showing that another form of equivalent compensation was provided. In contrast, New Jersey's hospital rate setting system neither required plans to provide a particular level of benefits nor required a plan to establish how its participants' health care costs are otherwise being paid for.

In *Arkansas Blue Cross and Blue Shield v. St. Mary's Hospital*, 947 F.2d 1341 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 2305 (1992), the Eighth Circuit held that an Arkansas statute that allowed a plan participant to assign benefits to health care providers, thus forcing plans to honor all assignments of benefits made by plan participants, was preempted by ERISA. While the court stated in its opinion that a state law's relationship to traditional state authority was not relevant to the question of whether a state statute relates to ERISA plans, the court went on to determine that this factor "is a policy consideration useful in deciding borderline questions of ERISA preemption," and analyzed the state statute at issue by reviewing the state's interest in enforcing it. *Arkansas Blue Cross*, 947 F.2d at 1350. Moreover, unlike the statute at issue in this case, the statute analyzed in *Arkansas Blue Cross* directed

plan administrators where benefits could be paid. This was a direct requirement imposed on the plans, and thus clearly could not be said to impact plans in a tenuous or remote manner.

The Eighth Circuit relied on *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 327 (2nd Cir. 1985) and *Boise Cascade Corporation v. Peterson*, 939 F.2d 632 (8th Cir. 1991) as authority for its conclusion in the *Arkansas Blue Cross* case regarding ERISA preemption. In both of these cases, however, the courts found that in order to avoid preemption, a statute representing the exercise of a traditional police power must *also* affect a plan in only a tenuous, remote or peripheral manner. *Gilbert*, 765 F.2d at 327, *Boise Cascade*, 939 F.2d at 639. This is the same reasoning utilized by the *Rebaldo* court. These cases similarly cannot be relied on as authority for the proposition that a conflict in the circuits exists regarding *Rebaldo's* enduring premise.[11]

Petitioners also rely on several lower court decisions where a generally applicable hospital rate setting law was found preempted and argue that a conflict is created by the existence of these decisions. First of all, the existence of these cases does not warrant further review by this Court, since this Court's rules do not permit the Court to exercise its discretion and grant a Petition for a Writ of Certiorari when there is a conflict between a Court of Appeals and a

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11. Petitioners also reference *Bricklayers Local No. 1 v. Louisiana Health Insurance*, 771 F. Supp. 771 (S.D. La. 1991), a District Court case. There, a Louisiana statute required plans to pay a $2 service charge as part of an individual's hospital bill. The funds were utilized to fund a catastrophic health insurance program. The Louisiana statute made the patient's insurance arrangement directly responsible for payment of the service charges and further required that payment of these charges had to be a "mandated benefit covered by an individual's insurance plan." The District Court decided that the statute was preempted. The Louisiana statute did not affect the plans in a tenuous or peripheral manner, since the service charge was levied directly on the plan, and the plan had no discretion as to whether to pay it or not.

lower court. Secondly, the analysis employed to strike down the hospital rate setting statutes at issue in each of these cases is seriously flawed.

In *Traveler's Insurance Company v. Cuomo*, 813 F. Supp. 996 (S.D.N.Y. 1993), *appeal pending*, No. 93-7194 (2nd Cir.), a federal District Court in New York invalidated certain aspects of New York's hospital rate setting scheme on ERISA preemption grounds and expressly stated that it would not follow *Rebaldo*. However, the District Court's decision in that case relied heavily on the decision of the District Court in the within matter, which was subsequently reversed by the Third Circuit. Petitioners also reference the state trial court decision in *United Health Services, Inc. v. Upstate Administrative Services*, 573 N.Y.S. 2d 851 (Sup. Ct. Broome Cty. 1991). The reasoning in *United Health* was based on a flawed premise. The court concluded that plan administrators were subjected to conflicting state regulations by virtue of the challenged statutory provision, since a plan which limited payment to the reimbursement of "actual expenses" would provide a different percentage level of coverage in New York than in a state that did not set reimbursement rates as New York did. This analysis presupposed that hospital rates in all states would have to be set in an identical manner in order to withstand scrutiny under ERISA, and overlooks the fact that things such as wage rates, material costs and the costs of doing business can differ dramatically in different parts of the United States.

Because there is no conflict between the circuits as to the portion of the *Rebaldo* holding relied on by the Third Circuit, and because this portion of the *Rebaldo* court's decision has not been overruled, it is clear that petitioners cannot demonstrate the existence of a conflict between the circuits which would justify the grant of their petition for a Writ of Certiorari.

III.

THE THIRD CIRCUIT'S DISPOSITION OF THE NYSA-ILA *WELFARE FUND'S TAKINGS CLAIM IS IN* FULL CONFORMITY WITH STANDARDS PREVIOUSLY DELINEATED BY THIS COURT.

Both the District Court and the Court of Appeals concluded that the inclusion of certain costs in the state regulated rates charged by New Jersey hospitals did not deprive petitioners of their property without just compensation in violation of the Fifth Amendment. Petitioner NYSA-ILA Welfare Fund has sought Supreme Court review of the lower courts' disposition of this issue. Since the lower courts decided this issue in conformity with existing Supreme Court precedent, there is no conflict between the Third Circuit's decision and existing decisions of this Court. In addition, there is no Court of Appeals decision which conflicts with the Third Circuit's resolution of this issue, and it does not raise an important question of federal law which has not previously been addressed by this Court. Therefore, no further review by this Court is available.

N.J.S.A. 26:2H-18.d (1992) provided that the reasonable cost of hospital services to indigent patients, as well as bad debts, were to be included as mandatory financial elements of a hospital's preliminary cost base. (Resp. A-20-21). Clearly, the inclusion of such costs in hospital rates does not amount to a physical taking of property. As a result, a less stringent "regulatory takings" analysis, rather than a per se takings analysis, applies to the statutes and regulations being challenged by petitioners. *Concrete Pipe and Products v. Construction Laborers Pension Trust,* 113 S. Ct. 2264, 2290 (1993).

This Court has held that the takings clause is not violated simply because legislation requires one person to use his or her assets for the benefit of another. *Connolly v. Pension Benefit*

Guaranty Corp., 475 U.S. 211, 223 (1986). Moreover, requiring money to be spent in a particular way does not constitute a taking. *See United States v. Sperry Corporation*, 493 U.S. 52 (1989); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 811 (1990). Evaluation of whether governmental regulation of property constitutes a taking requires an ad hoc factual inquiry into the circumstances of each case. *Connolly*, 475 U.S. at 224. This Court has identified three factors which are to be analyzed in making such a determination. These are: (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124 (1978).

The nature of the challenged governmental action here is the inclusion of uncompensated care costs and the costs of the Medicare shortfall and payor differentials in the hospital bills given to all patients. In order to enable hospitals to remain in operation and to provide care to all in need of hospital services, the state reasonably determined that the costs of this care should be spread among all hospital patients. As a result, the Third Circuit concluded that New Jersey's rate system merely "adjusts the benefits and burdens of economic life to promote the common good," a factor which militates against the finding that a taking has occurred. *Concrete Pipe*, 113 S. Ct. at 2290, *quoting Connolly*, 475 U.S. at 225.

Petitioner asserts that a taking occurred because the uncompensated care add-ons paid by ERISA plan participants were paid into a fund managed and controlled by a state bureaucracy. The utilization of this mechanism by the state plainly does not result in the permanent appropriation of private assets. The trust fund mechanism referred to was merely a conduit utilized to fairly distribute collected uncompensated care monies to

hospitals.[12] These monies were not retained by the state. Monies attributable to the Medicare cost shift and payor differentials went directly to hospitals as a component of their hospital rates, and therefore cannot be considered to be appropriated by the state for its own use.

As both the District Court and the Court of Appeals found, plan participants received a clear, specific economic benefit from New Jersey's hospital rate setting system. Therefore, the system's economic impact on them is not so severe as to justify a finding that a taking has occurred. The amount of money paid by plan participants is not determined on an ad hoc basis, since amounts attributable to uncompensated care, the Medicare cost shift and payor differentials were directly related to an individual plan participant's hospital bill. Even in the absence of state regulation of hospital costs, hospitals would have to recoup these costs, because they would go out of business if they failed to do so. By ensuring the recovery of such costs and enabling hospitals to stay in business, New Jersey's hospital rate setting scheme thus protected the interests of ERISA plan participants (and users of hospital services generally) in maintaining access to health care. In addition, to the extent that individual plan participants might not have sufficient assets to pay their full hospital bill, the inclusion of the costs attributable to bad debts within hospital rates would have resulted in coverage of a portion of their bills.

Because hospital rate setting has long been heavily regulated on both the federal and state levels due to its technical complexity, the District Court and Court of Appeals were correct in finding that New Jersey's hospital rate setting statute did not interfere with "reasonable investment-backed expectations." As this Court has

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12. Petitioner's oblique reference to the state's use of the trust fund mechanism as a vehicle for obtaining federal matching funds from the Medicaid program is irrelevant to a takings analysis, as such funds are clearly not private monies.

previously held, reasonable investment-backed expectations under the takings clause must amount to more than a "unilateral expectation." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980).

New Jersey's inclusion of uncompensated care costs and costs attributable to the Medicare cost shift and payor differentials was a long standing feature of New Jersey's state regulated hospital rate setting system. More importantly, as the District Court expressly found, if hospitals established their rates under a free market, competitive system, the challenged components could clearly be included as a portion of the hospital's overall reasonable charge. (Pet. A-92). Given the mechanics of hospital pricing, petitioners cannot reasonably assert that they have a vested right in having the hospital rates they pay exclude such costs.

Since the Third Circuit's decision conforms with prior decisions of this Court as to petitioner's takings claims, there is no valid reason for this Court to revisit the conclusions reached by the lower courts as to these claims.

IV.

THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Petitioners urge the Court to grant their Petitions because of the current national interest in health care reform. They also contend that the Court needs to review this case because of pending legislative initiatives in a number of states concerning hospital rate setting.

No matter how much interest may be engendered by health care issues at the moment, these circumstances clearly do not

warrant this Court's review. First of all, this case does not present a novel issue that has not previously been addressed by the Supreme Court. While the specific, narrow issue of ERISA preemption in the context of hospital rate setting has not been addressed, this Court has had occasion to review the general question of whether a state statute should be found preempted by ERISA numerous times. In deciding these cases, the Court has fashioned a test which requires that the state statute must impact upon the ERISA plan, rather than plan participants or plan benefits, in order for it to be found preempted. All that the Third Circuit did was to apply the analysis previously reached by the Court in these cases in concluding that New Jersey's hospital rate setting statute did not impact upon the plan in a manner which would require preemption.

The significance of the Third Circuit's decision has largely been eclipsed by subsequent developments in New Jersey. The State of New Jersey deregulated hospital rate setting effective January 1, 1993. *L.* 1992, c. 160. As a result, any decision the Court might reach would have no impact whatsoever on the establishment of hospital rates in New Jersey, since that function is no longer state regulated. The only remaining "live" issue between the parties relates to the question of whether plans should have to pay the full DRG rate for services rendered during the period that this litigation was ongoing. While final resolution of this issue might be important to the individual parties from a financial perspective, it clearly does not present the Court with an ongoing issue of such national importance that review by this Court is warranted.

Finally, the fact that there are pending legislative initiatives with respect to the issue of hospital rate setting in a number of states does not warrant further review by this Court. While health care reform may indeed be a pressing national issue, this court is not in the business of rendering advisory opinions. Yet this is tantamount to what petitioners are seeking when they requested review of this case because of pending state legislative initiatives.

Given the large number of federal court decisions in existence where an ERISA preemption claim was addressed, it is more than likely that this Court will have the opportunity to revisit the limits of its prior preemption decisions again in the future. Accordingly, this is not a case which presents a special or novel issue that would warrant Supreme Court review.

CONCLUSION

Because petitioners have failed to establish that they meet the requirements for the grant of a Petition for a Writ of Certiorari, it is respectfully requested that the Court deny the Petitions for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — CORPORATE DESIGNATION OF RESPONDENTS

In accordance with Rule 29.1, respondents state that they have the following corporate parent-subsidiary relationships:

1. Atlantic City Medical Center; No parent or subsidiaries.

2. Nathan and Miriam Barnert Memorial Hospital d/b/a Barnert Hospital; No parent or subsidiaries.

3. Bayonne Hospital; No parent or subsidiaries.

4. Bayshore Community Hospital; Parent - Bayshore Health Care Services, Inc.; No subsidiaries.

5. Burdette Tomlin Memorial Hospital; Parent - Cape Health System, Inc.; No subsidiaries.

6. Chilton Memorial Hospital; Parent - Memorial Health Foundation (formerly known as Chilton Memorial Corporation); No subsidiaries.

7. Christ Hospital; Parent - Christ Hospital Health Services Corporation; No subsidiaries.

8. Clara Maass Medical Center; Parent - Clara Maass Health Systems, Inc.; No subsidiaries.

9. Community Medical Center; Parent - Community Memorial Health Services; No subsidiaries.

10. Cooper Hospital/University Medical Center; Parent - Cooper Health Care; No subsidiaries.

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11. Deborah Heart and Lung Center; No parent or subsidiaries.

12. Dover General Hospital & Medical Center; Parent - Lake Area Health System; No subsidiaries.

13. East Orange General Hospital; Parent - Essex Valley Health Care; No subsidiaries.

14. Englewood Hospital and Medical Center; Parent - Englewood Health Care Foundation, Inc.; No subsidiaries.

15. Hackensack Medical Center; Parent - Hillcrest Health Service System, Inc.; No subsidiaries.

16. Hackettstown Community Hospital; No parent or subsidiaries.

17. Helene Fuld Medical Center; Parent - Helene Fuld Healthcare; No subsidiaries.

18. Holy Name Hospital; No parent or subsidiaries.

19. Hunterdon Medical Center; Parent - Hunterdon Healthcare System, Inc.; No subsidiaries.

20. Irvington General Hospital; Parent - Beth Health Care Services Corporation; No subsidiaries.

21. Jersey Shore Medical Center; Parent - Modern Health Affiliates, Inc.; No subsidiaries.

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22. Community Hospital Group, Inc. d/b/a The JFK Medical Center; Parent - JFK Health Systems; No subsidiaries.

23. Kennedy Memorial Hospitals-University Medical Center; Parent - Kennedy Health Care Foundation; No subsidiaries.

24. William B. Kessler Memorial Hospital; No parent or subsidiaries.

25. Kimball Medical Center; Parent - Kimball Health Care Corporation; No subsidiaries.

26. The Medical Center of Ocean County, Inc.; Parent - The Ocean Health System, Inc.; No subsidiaries.

27. The Mercer Medical Center; No parent or subsidiaries.

28. Memorial Hospital of Burlington County; Parent - Memorial Health Alliance, Inc.; Subsidiary - Women's Auxiliary Board to Memorial Hospital of Burlington County.

29. Monmouth Medical Center; Parent - Mid-Atlantic Health Group, Inc.; No subsidiaries.

30. Morristown Memorial Hospital; Parent - Memorial Health Foundation, Inc.; No subsidiaries.

31. The Mountainside Hospital; Parent - Mountainside Hospital Healthcare, Inc.; No subsidiaries.

32. Muhlenberg Regional Medical Center; Parent - The Huntington Foundation; Subsidiaries - Muhlenberg Auxiliary, Inc.; and Muhlenberg Foundation, Inc.

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33. Newark Beth Israel Medical Center; Parent - Beth Health Care Services Corporation; No subsidiaries.

34. New Jersey Hospital Association; No parent or subsidiaries.

35. Newton Memorial Hospital; Parent - North Jersey Health Care Corp.; No subsidiaries.

36. The Hospital Center at Orange; No Parent; Subsidiaries - HCO Plus; Meals on Wheels; Orange Mountain Health Care; OMH Services; Zorah; and 323 Central Avenue.

37. Our Lady of Lourdes Medical Center; Parent - Our Lady of Lourdes Health Care Services, Inc.; Subsidiaries - Osborne Family Health Center, Inc.; and Our Lady of Lourdes School of Nursing.

38. Overlook Hospital; No parent or subsidiaries.

39. Palisades General Hospital; No parent or subsidiaries.

40. Pascack Valley Hospital; Parent - Well Care Group, Inc.; No subsidiaries.

41. The General Hospital Center of Passaic; Parent - Healthcare Continuum, Inc.; No subsidiaries.

42. The Medical Center at Princeton; No parent or subsidiaries.

43. Rahway Hospital; Parent - Recovery Healthsystems, Inc.; No subsidiaries.

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44. Raritan Bay Medical Center; Parent - Raritan Bay Health Service Corporation; No subsidiaries.

45. Riverview Medical Center; Parent - Riverview Health Care

46. Robert Wood Johnson University Hospital; Parent - RWJ Healthcare Corporation; No subsidiaries.

47. Kennedy Memorial Hospitals at Saddle Brook, Inc.; Parent - Kessler Rehabilitation Corporation; No subsidiaries.

48. Shore Memorial Hospital; Parent - Shore Memorial Health Foundation, Inc.; No subsidiaries.

49. Somerset Medical Center; Parent - Somerset Health Care Corporation; No subsidiaries.

50. South Amboy Memorial Hospital; Parent - South Amboy Memorial Hospital Association; No subsidiaries.

51. South Jersey Hospital System; Parent - Cooperative Health Care of Southern New Jersey, Inc.; Subsidiary - Community Health Care, Inc.

52. St. Barnabas Medical Center; Parent - St. Barnabas Corporation; No subsidiaries.

53. St. Clare's/Riverside Medical Center; Parent - SSM Healthcare Ministry Corporation; No subsidiaries.

54. St. Elizabeth Hospital; No parent or subsidiaries.

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55. St. Francis Hospital; Parent - Franciscan Health System of New Jersey, Inc.; No subsidiaries.

56. St. James Hospital; Parent - Cathedral Health Services, Inc.; No subsidiaries.

57. St. Joseph's Hospital & Medical Center; No parent or subsidiaries.

58. St. Mary Hospital; Parent - Franciscan Health System of New Jersey, Inc.; No subsidiaries.

59. St. Michael's Medical Center; Parent - Cathedral Health Services, Inc.; No subsidiaries.

60. St. Peter's Medical Center; No parent or subsidiaries.

61. Union Hospital; Parent - Mega Source, Inc.; No subsidiaries.

62. United Hospitals Medical Center; No parent or subsidiaries.

63. Underwood-Memorial Hospital; Parent - Underwood-Memorial Health Systems, Inc.; No subsidiaries.

64. The Valley Hospital; Parent - Valley Care Corp.; Subsidiary - Valley Health Services, Inc.

65. Wallkill Valley Hospital & Health Centers; Parent - Sisters of Sorrowful Mothers; No subsidiaries.

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66. Warren Hospital; Parent - Warren Hospital Health Services Corporation; No subsidiaries.

67. Wayne General Hospital; Parent - North Jersey Meditech; No subsidiaries.

68. West Hudson Hospital; Parent - Trico Health Care, Inc.; No subsidiaries.

69. West Jersey Hospital; Parent - West Jersey Health System; No subsidiaries.

70. Zurbrugg Memorial Hospital; Parent - Zurbrugg Health Foundation; No subsidiaries.

APPENDIX B — STATUTES REFERENCED

N.J.S.A. 26:2H-1

26:2H-1. Declaration of policy

It is hereby declared to be the public policy of the State that hospital and related health care services of the highest quality, of demonstrated need, efficiently provided and properly utilized at a reasonable cost are of vital concern to the public health. In order to provide for the protection and promotion of the health of the inhabitants of the State, promote the financial solvency of hospitals and similar health care facilities and contain the rising cost of health care services, the State Department of Health, which has been designated as the sole agency in this State for comprehensive health planning under the "National Health Planning and Resources Development Act of 1974" (Federal Law 93-641),[1] as amended and supplemented, shall have the central, comprehensive responsibility for the development and administration of the State's policy with respect to health planning, hospital and related health care services and health care facility cost containment programs, and all public and private institutions, whether State, county, municipal, incorporated or not incorporated serving principally as residential health care facilities, nursing or maternity homes or as facilities for the prevention, diagnosis, or treatment of human disease, pain, injury, deformity or physical condition, shall be subject to the provisions of this act.

N.J.S.A. 26:2H-2

26:2H-2. Definitions

The following words or phrases, as used in this act, shall have the following meanings, unless the context otherwise requires:

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1. 42 U.S.C.A. § 300k et seq.

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a. "Health care facility" means the facility or institution whether public or private, engaged principally in providing services for health maintenance organizations, diagnosis of treatment of human disease, pain, injury, deformity or physical condition, including, but not limited to, a general hospital, special hospital, mental hospital, public health center, diagnostic center, treatment center, rehabilitation center, extended care facility, skilled nursing home, nursing home, intermediate care facility, tuberculosis hospital, chronic disease hospital, maternity hospital, outpatient clinic, dispensary, home health care agency, residential health care facility and bioanalytical laboratory (except as specifically excluded hereunder) or central services facility serving one or more such institutions but excluding institutions that provide healing solely by prayer and excluding such bioanalytical laboratories as are independently owned and operated, and are not owned, operated, managed or controlled, in whole or in part, directly or indirectly by any one or more health care facilities, and the predominant source of business of which is not by contract with health care facilities within the State of New Jersey and which solicit or accept specimens and operate predominantly in interstate commerce.

b. "Health care service" means the preadmission, outpatient, inpatient and postdischarge care provided in or by a health care facility, and such other items or services as are necessary for such care, which are provided by or under the supervision of a physician for the purpose of health maintenance organizations, diagnosis or treatment of human disease, pain, injury, disability, deformity or physical condition, including, but not limited to, nursing service, home care nursing and other paramedical service, ambulance service, service provided by an intern, resident in training or physician whose compensation is provided through agreement with a health care facility, laboratory service, medical social

service, drugs, biologicals, supplies, appliances, equipment, bed and board, but excluding services provided by a physician in his private practice or by practitioners of healing solely by prayer, and services provided first aid rescue and ambulance squads as defined in the "New Jersey Safety Highway Act of 1971," P.L. 1971, c. 351 (C. 27:5F-1 et seq.).

c. "Construction" means the erection, building, or substantial acquisition, alteration, reconstruction, improvement, renovation, extension or modification of a health care facility, including its equipment, the inspection and supervision thereof; and the studies, surveys, designs, plans, working drawings, specifications, procedures, and other actions necessary thereto.

d. "Board" means the Health Care Administration Board established pursuant to this act.

e. "Commission" means the Hospital Rate Setting Commission established pursuant to this act.

f. "Government agency" means a department, board, bureau, division, office, agency, public benefit or other corporation, or any other unit, however described, of the State or political subdivision thereof.

g. "Statewide Health Coordinating Council" means the Statewide Health Coordinating Council formed under the provisions of Federal Law 93-641, as amended and supplemented.[1]

h. "Health Systems Agency" means an officially recognized health systems agency formed under the provisions of Federal law 93-641 as amended and supplemented.[2]

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1. 42 U.S.C. A. § 300k et seq.

2. 42 U.S.C.A. § 300*l*-1

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i. "Department" means the State Department of Health.

j. "Commissioner" means the State Commissioner of Health.

k. "Preliminary cost base" means that proportion of a hospital's current cost which may reasonably be required to be reimbursed to a properly utilized hospital for the efficient and effective delivery of appropriate and necessary health care services of high quality required by such hospital's mix of patients. The preliminary cost base initially may include costs identified by the commissioner and approved or adjusted by the commission as being in excess of that proportion of a hospital's current costs identified above, which excess costs shall be eliminated in a timely and reasonable manner prior to certification of the revenue base. The preliminary cost base shall be established in accordance with regulations proposed by the commissioner and approved by the board.

l. "Certified revenue base" means the preliminary cost base adjusted by the commission, as appropriate and necessary pursuant to regulations proposed by the commissioner and approved by the board, to provide for the financial solvency of a hospital which is properly utilized and which delivers, effectively and efficiently, appropriate and necessary health care services of a high quality required by its mix of patients.

m. "Provider of health care" means an individual (1) who is a direct provided of health care service in that the individual's primary activity is the provision of health care services to individuals or the administration of health care facilities in which such care is provided and, when required by State law, the individual has received professional training in the provision of such services or in such administration and is licensed or certified

for such provision or administration; or (2) who is an indirect provider of health care in that the individual (a) holds a fiduciary position with, or has a fiduciary interest in, any entity described in subparagraph b(ii) or subparagraph b(iv); provided, however, that a member of the governing body of a county or any elected official shall not be deemed to be a provider of health care unless he is a member of the board of trustees of a health care facility or a member of a board, committee or body with authority similar to that of a board of trustees, or unless he participates in the direct administration of a health care facility; or (b) received, either directly or through his spouse, more than one-tenth of his gross annual income for any one or more of the following:

(i) Fees or other compensation for research into or instruction in the provision of health care services;

(ii) Entities engaged in the provision of health care services or in research or instruction in the provision of health care services;

(iii) Producing or supplying drugs or other articles for individuals or entities for use in the provision of or in research into or instruction in the provision of health care services;

(iv) Entities engaged in producing drugs or such other articles.

n. "Private long-term health care facility" means a nursing home, skilled nursing home or intermediate care facility presently in operation and licensed as such prior to the adoption of the 1967 Life Safety Code by the State Department of Health in 1972 and which has a maximum 50-bed capacity and which does not accommodate Medicare or Medicaid patients.

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N.J.S.A. 26:2H-4.1

26:2H-4.1. Hospital rate setting commission

a. There is hereby established in the State Department of Health a Hospital Rate Setting Commission which shall consist of five members, three of whom shall be appointed by the Governor with the advice and consent of the Senate for terms of 4 years. Of the initial appointees, one shall serve for a term of 2 years and one for a term of 3 years. No member shall be eligible for appointment for more than two full consecutive terms. Two of the members appointed by the Governor shall be consumers of health care services who are not providers of health care services, and one shall have experience in hospital administration or finance. The Commissioners of the State Departments of Health and Insurance or their designated representatives, who shall be officials with the rank of deputy or assistant commissioner, shall serve as ex-officio voting members of the commission. The commission shall annually select a chairman from among its members. Three members of the commission shall constitute a quorum and no action of the commission shall be taken except upon the affirmative vote of a majority of its members.

The appointed members of the commission shall each receive compensation at $150.00 per day. The commission members shall also be entitled to reasonable expenses incurred in the performance of their duties. Any such member may be removed from office by the Governor, for good cause shown. Any vacancy occurring in the membership of the commission for any cause shall be filled in the same manner as the original appointment but for the unexpired term only. A member shall otherwise continue to serve after expiration of his term until a new appointment is made.

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The commission shall select an executive secretary and the commissioner shall provide to the commission such clerical staff, supplies and equipment as may be necessary for it to faithfully discharge its duties.

The commission shall be established and its members appointed by January 1, 1979.

b. The commissioner shall determine the order in which hospitals shall have their preliminary cost base and appropriate schedule of rates approved by the commission. The commissioner shall propose and the commission approve or adjust the preliminary cost base, and the commission shall approve an appropriate schedule of rates for all hospitals by January 1, 1983. The schedule of rates shall be reasonable and sufficient to provide the revenue requirements of the preliminary cost base and shall be adjusted from time to time, as appropriate, to reach the certified revenue base.

The commission shall certify the revenue base, provided the conditions described in subsections k. and *l.* of section 2 of this act has been met, and shall perform such other duties as are specified elsewhere in this act.

A hospital shall continue to be reimbursed under the rate setting system in effect on the day preceding the effective date of this act, except as said system is amended by regulation, until the commission approves the hospital's preliminary cost base.

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N.J.S.A. 26:2H-5

26:2H-5. Powers of commissioner

a. The commissioner, to effectuate the provisions and purposes of this act, shall have the power to inquire into health care services and the operation of health care facilities and to conduct periodic inspections of such facilities with respect to the fitness and adequacy of the premises, equipment, personnel, rules and bylaws and the adequacy of financial resources and sources of future revenues.

b. The commissioner, with the approval of the board, shall adopt and amend rules and regulations in accordance with the Administrative Procedure Act, P.L. 1968, c. 410 (C. 52:14B-1 et seq.) to effectuate the provisions and purposes of this act, including but not limited to: (1) the establishment of requirements for a uniform Statewide system of reports and audit relating to the quality of health care provided, health care facility utilization and costs; (2) certification by the department of schedules of rates, payments, reimbursement, grants and other charges for health care services as provided in section 18; and (3) standards and procedures relating to the licensing of health care facilities and the institution of additional health care services.

c. The commissioner may enter into contracts with any government agency, institution of higher learning, voluntary nonprofit agency, or appropriate planning agency or council; and such entities are authorized to enter into contracts with the commissioner to effectuate the provisions and purposes of this art.

d. The commissioner may provide consultation and assistance to health care facilities in operational techniques,

including but not limited to, planning, principles of management, and standards of health care services.

e. At the request of the commissioner, health care facilities shall furnish to the Department of Health such reports and information as it may require to effectuate the provisions and purposes of this act, excluding confidential communications from patients.

f. The commissioner may institute or cause to be instituted in a court of competent jurisdiction proceedings to compel compliance with the provisions of this act or the determinations, rules, regulations and orders of the commissioner.

g. Notwithstanding any rules and regulations governing private long-term health care facilities and enforcing the 1967 Life Safety Code, as amended and supplemented, the commissioner shall permit third floor occupancy of such facilities by owners, members of their immediate families, and licensed professionals employed at such facilities.

N.J.S.A. 26:2H-12

26:2H-12. Health care facility; requirements for operation; license; application; fees; issuance; renewals

a. No health care facility shall be operated unless it shall: (1) possess a valid license issued pursuant to this act, which license shall specify the kind or kinds of health care services the facility is authorized to provide; (2) establish and maintain a uniform system of cost accounting approved by the commissioner; (3) establish and maintain a uniform system of reports and audits meeting the requirements of the commissioner; (4) prepare and review

annually a long range plan for the provision of health care services, which plan shall be compatible with the State Health Plan established pursuant to the "National Health Planning and Resources Development Act of 1974" (Federal Law 93-641)[1] as related to medical health services, health care services, and health manpower; and (5) establish and maintain a centralized, coordinated system of discharge planning which assures every patient a planned program of continuing care and which meets the requirements of the commissioner which requirements shall, where feasible, equal or exceed those standards and regulations established by the Federal Government for all federally-funded health care facilities but shall not require any person who is not in receipt of State or Federal assistance to be discharged against his will.

b. (1) Application for a license for a health care facility shall be made upon forms prescribed by the department. The department shall charge such nonrefundable fees for the filing of an application for a license and any renewal thereof, as it shall from time to time fix in rules or regulations; provided, however, that no such fee shall exceed $2,000.00. The application shall contain the name of the health care facility, the kind or kinds of health care service to be provided, the location and physical description of the institution, and such other information as the department may require. (2) A license shall be issued by the department upon its findings that the premises, equipment, personnel, including principals and management, finances, rules and bylaws, and standards of health care service are fit and adequate and there is reasonable assurance the health care facility will be operated in the manner required by this act and rules and regulations thereunder.

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1. 42 U.S.C.A. § 300K et seq.

c. A license issued before the effective date of this act to a health care facility for its operation, upon the first renewal date thereafter, may be extended for a 1 year period of time, provided the facility then meets the requirements for licensure at the time said license was issued and submits an acceptable plan to meet current requirements at the end of said period of time.

N.J.S.A. 26:2H-18

26:2H-18. Payments by government agency or hospital service corporation; determination of rates

a. No government agency and no hospital service corporation organized under the laws of the State and no other purchasers of health care services shall purchase, pay for or make reimbursement or grant-in-aid for any health care service provided by a health care facility unless at the time the service was provided, the health care facility possessed a valid license or was otherwise authorized to provide such service.

b. Payment by government agencies other than those made through the Medical Assistance and Health Services Act, P.L. 1968, c. 413 (C. 30:4D-1 et seq.), and payment by hospital service corporations organized under the laws of this State for health care services provided by a hospital shall be at reasonable rates approved by the commission as provided for by regulations proposed by the commissioner and approved by the board.

The schedule of rates shall be reasonable and sufficient to provide the revenue requirements of the certified revenue base of a hospital, considering the health care system as a whole and based on financial elements approved by the commissioner. Nothing herein shall be construed to prohibit the Commissioner of Human

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Services from contracting with the Commissioner of Health for the commission to approve rates, on behalf of the Commissioner of Health, by which hospitals are reimbursed pursuant to the Medical Assistance and Health Services Act, P.L. 1968, c. 413 (C. 30:4D-1 et seq.). Rates of payment by hospital service corporations organized under the law of this State for health care services provided by a hospital shall be set by the commission. Payment by all other purchasers of health care services provided by a hospital shall be at reasonable rates approved by the commission as provided in this act. All payment rates shall be equitable for each payor or class of payors without discrimination or individual preference except for quantifiable economic benefits rendered to the institution or to the health care delivery system taken as a whole. In addition to other such benefits which the commission may consider, it shall consider the following, if found to be quantifiable: (1) degree of promptness and volume of payments to hospitals so that hospitals are provided with funds for current financing of their services; and (2) broad provision of health insurance coverages which are not otherwise affordable or obtainable at premium rates which are not self-supporting. In determining the quantifiable economic benefits to which consideration shall be given in approving payment rates, the commission may consider overall financial benefits to society which are provided by programs offered by a payor or class of payors.

c. Payment by government agencies other than those made through the Medical Assistance and Health Services Act, P.L. 1968, c. 413 (C. 30:4D-1 et seq.), and payment by hospital service corporations organized under the laws of this State for health services provided by health care facilities other than hospitals shall be at reasonable rates set by the commissioner based on financial elements approved by him; provided, however, that nothing herein

shall be construed to prohibit the Commissioner of Human Services from contracting with the commissioner for the setting of rates by which health care facilities other than hospitals are reimbursed pursuant to the Medical Assistance and Health Services Act, P.L. 1968, c. 413 (C. 30:4D-1 et seq.). Rates of payment by hospital service corporations organized under the laws of this State for health care services provided by a health care facility other than hospitals shall be set in consultation with the Commissioner of Insurance.

d. The financial elements of the preliminary cost base and of the certified revenue base shall include the reasonable cost of the following, as defined in regulations proposed by the commissioner and approved by the board: direct patient care; principal and interest payments; paid taxes, excluding income taxes; educational, research and training programs, not otherwise paid for by the State; the provision of health care services to individuals unable to pay for them for reasons of indigency; bad debts, provided adequate recovery procedures are followed; preservation, replacement and improvement of facility and equipment subject to appropriate planning requirements; and reasonable working capital. Said financial elements may include, where applicable and appropriate, a reasonable return on investment where a hospital is operating efficiently and effectively. In determining proposed payments to hospitals, the commissioner shall take into account a facility's income from all sources, including specific purpose grants and other funds from governmental sources, but excluding income and principal from board or donor restricted funds, gifts and special fund raising projects.

To establish and maintain a fair and equitable system for determining such payments, the commissioner shall require each

health care facility to report such financial, statistical and patient information as may be required, in accordance with a uniform system of reporting established by him. The commissioner may propose regulations for approval by the board which assess penalties for failure to report such information within such time as may be prescribed therein.

N.J.S.A. 26:2H-18.1

26:2H-18.1. Preliminary cost base, certified revenue base or schedule of rates; adjustments; determination and review by commission; regulations

a. The commission shall make the determinations and hear appeals provided for in this act in a timely manner pursuant to regulations proposed by the commissioner and approved by the board. Such regulations shall be presented to the Standing Legislative Committees on Institutions, Health and Welfare for final approval within 1 year following establishment of the commission pursuant to the provisions of this act, and shall remain in effect in the form proposed by the commissioner and approved by the board until the provisions of such regulations are enacted into law as amendments to this act. Such regulations shall require that in the event the commission does not perform its duties within the time period specified therein the commission may permit a hospital to make a temporary reasonable change in rates which shall be effective immediately, when it deems it in the public interest to do so. Notwithstanding such temporary change in rates, the review procedure set forth in this section shall be conducted by the commission as soon thereafter as is possible.

b. Pursuant to regulations proposed by the commissioner and approved by the board, the commissioner shall propose and the

commission shall make automatic periodic adjustments to each preliminary cost base or certified revenue base for changes in economic factors reasonably calculated to provide for the effects of general economic inflation or deflation; for industry wide changes in the efficiency of delivering health care services; and for each hospital's actual changes in volume and case-mix, which are necessary and appropriate. The commission shall approve an appropriate change in the schedule of rates to reflect these adjustments.

c. Pursuant to regulations proposed by the commissioner and approved by the board, the commission shall consider adjustments to the certified revenue bases and schedules of rates, provided such adjustments: (1) result from statutes and regulations affecting the delivery of health care; and (2) may affect one or more hospitals. Such adjustments shall take into account the effectiveness and efficiency of the health care delivery system as a whole. Where appropriate the commission may sit en banc and hold public hearings in order to obtain the evidence required to support its conclusions and determinations. In the case of such hearings the commission shall provide actual notice to the affected planning and licensing authorities and hospitals, and to the commissioner and the Public Advocate.

d. Pursuant to regulations proposed by the commissioner and approved by the board, all other changes in the commission's determinations shall require a review by the commission in a public hearing of the entire preliminary cost base or certified revenue base and schedule of rates. Determinations of the commission may be appealed by hospitals, the commissioner, the Public Advocate, affected planning, licensing or inspection agencies and payors, and other affected parties, and shall be conducted as contested proceedings under the Administrative

Procedures Act, P.L. 1968, c. 410 (C. 52:14B-1 et seq.). During the pendency of any appeal, the schedule of rates approved by the commission pursuant to sections 5 and 10 of this act[1] shall remain in effect.

In all appeals, the burden of proof shall be on the petitioner. All determinations rendered hereunder shall be consistent with regulations and shall set forth in detail the commission's reasoning and conclusions regarding the parties and considerations specified in this act.

P.L. 1971, c. 136, § 18

* * *

18.

a. No government agency and no hospital service corporation organized under the laws of the State shall purchase, pay for or make reimbursement or grant-in-aid for any health care service provided by a health care facility unless at the time the service was provided, the health care facility possessed a valid license or was otherwise authorized to provide such service.

b. Payment by government agencies for health care services provided by a health care facility shall be at rates established by the commissioner, based on elements of costs approved by him.

c. The Commissioner of Health in consultation with the Commissioner of Insurance shall determine and certify the costs of providing health care services, as reported by health care facilities, which are derived in accordance with a uniform system of cost

1. Sections 26:2H-4.1, 26:2H-18.

accounting approved by the Commissioner of Health. Said certification shall specify the elements and details of costs taken into consideration.

d. Payment by hospital service corporations, organized under the laws of this State, for health care services provided by a health care facility shall be at rates approved as to reasonableness by the Commissioner of Insurance with the approval of the Commissioner of Health. In establishing such rates, the commissioners shall take into consideration the total costs of the health care facility.

P.L. 1991, c. 187, § 1

CHAPTER 187

1.[1] (New section) The Legislature finds and declares that:

a. Access to quality health care shall not be denied to residents of the State because of their inability to pay for the care; there are many residents of the State, particularly those with incomes below the federal poverty level, who cannot pay for needed hospital care and in order to ensure that these persons have equal access to hospital care it is necessary to maintain a mechanism which will ensure payment of uncompensated hospital care; and to protect the fiscal solvency of the State's general hospitals, as provided for in P.L. 1971, c. 136 (C. 26:2H-1 et al.), it is necessary that all payers of health care services share equally in the payment of uncompensated care on a Statewide basis.

b. The "New Jersey Uncompensated Care Trust Fund," created pursuant to P.L. 1986, c. 204, and continued pursuant to

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1. N.J.S.A. 26:2H-18.24.

Appendix B

P.L. 1989, c. 1 (C. 26:2H-18.4 et seq.), which law expired on December 31, 1990, by which hospitals were able to collect their reasonable cost of approved uncompensated care, resulted in unobstructed access to health care for reidents without insurance who otherwise are unable to afford care.

c. Having received and thoroughly reviewed the reports issued by the Commissioner of Health and the Governor's Commission on Health Care Costs on uncompensated care, its economic implications and various means of financing uncompensated care, it is evident that provision for a trust fund is necessary, with modifications, to ensure access to hospital care for those who cannot afford to pay and the fiscal solvency of hospitals. At the same time, the State should take further actions to: provide more comprehensive Medicaid coverage for the medically indigent, reduce the rate of increase in health insurance premiums and explore and implement various initiatives to reduce the amount of uncompensated care in this State without impairing access to care.

Supreme Court, U.S.
FILED
SEP 29 1993

Nos. 93-115, 93-193, 93-194, 93-210

In The

Supreme Court of the United States

October Term, 1993

NYSA-ILA WELFARE FUND, et al.,

Petitioners,

v.

FRANCES J. DUNSTON, in her capacity as NEW JERSEY COMMISSIONER OF HEALTH, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit*

RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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NEW JERSEY CARPENTERS WELFARE FUND, et al.,

Petitioners,

v.

FRANCES J. DUNSTON, in her capacity as
NEW JERSEY COMMISSIONER OF HEALTH, et al.,

Respondents.

TRUSTEES OF THE WELFARE TRUST FUND,
LOCAL UNION NO. 475, et al.,

Petitioners,

v.

FRANCES J. DUNSTON, in her capacity as
NEW JERSEY COMMISSIONER OF HEALTH, et al.,

Respondents.

UNITED WIRE, METAL & MACHINE HEALTH
AND WELFARE FUND, et al.,

Petitioners,

v.

MORRISTOWN MEMORIAL HOSPITAL, et al.,

Respondents.

QUESTIONS PRESENTED

1. Did New Jersey's now-repealed system of hospital rate regulation "relate to" employee benefit plans within the meaning of section 514(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a)? More generally stated, does a state regulatory system that sets the price of hospital care for patients but that does not impose any coverage or reimbursement obligations on third-party payors "relate to" employee benefit plans?

2. Does a state system of hospital rate regulation that folds into the rate structure costs arising from the provision of hospital care to non-paying or underpaying patients result in a compensable "taking" of employee benefit plan property?

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STATEMENT OF THE CASE

I. New Jersey's Former Rate System.

In 1978, the New Jersey Legislature enacted a system of hospital rate regulation to "promote the financial solvency of hospitals . . . and contain the rising costs of health care services." N.J. Stat. Ann. ("N.J.S.A.") 26:2H-1 (amended 1992).* Under this system, the many types of medical procedures performed at hospitals were divided into "diagnostic related groups" ("DRGs"), and a rate assigned to each DRG. The system was designed to penalize hospitals that incurred costs greater than the DRG rate and to reward more efficient hospitals, thereby providing hospitals with an incentive to keep costs down. *See, e.g.*, N.J. Admin. Code ("N.J.A.C.") 8:31B-3.5.

Like most if not all regulatory rate systems, New Jersey's former hospital rate system operated on the premise that the rates should allow efficient members of the regulated industry to recover their reasonable costs of doing business. N.J.A.C. 8:31B-1.1. One cost of doing business as a hospital is the cost of providing care to patients who are unable to pay their bills, a cost known as "uncompensated care." In all states, hospitals incur substantial uncompensated care costs, both because federal law requires hospitals to treat emergency patients regardless of ability to pay, *see* 42 U.S.C. § 1395dd, and because many hospitals, under their internal by-laws and operating procedures, impose similar requirements on themselves. In New Jersey, state law requires all hospitals to

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*The New Jersey Statutes referenced herein are reproduced in the Appendix to the Brief in Opposition on behalf of respondent New Jersey Hospital Association.

accept and treat patients regardless of ability to pay. *See* N.J.S.A. 26:2H-18.64; N.J.A.C. 8:43G-5.2(c).

Under the rate system as originally enacted, uncompensated care costs incurred by a particular hospital were borne only by that hospital's patients. Each hospital, therefore, included in its rates a hospital-specific charge for uncompensated care in order to recover its costs in this area. Over time, hospitals providing large amounts of uncompensated care – primarily hospitals located in the state's urban areas – were thus forced to charge higher rates than other hospitals. The resultant disparity in rates threatened the financial viability of New Jersey's inner-city hospitals.

In response to this problem, and to avoid the prospect of large urban areas and populations with no accessible hospital care, New Jersey amended its rate-setting system in 1987 to provide that all hospitals in the state would share equally in the cost of uncompensated care. Under this amendment, all hospital bills were required to include a uniform uncompensated care charge, set annually by the State's Hospital Rate-Setting Commission at a level intended to generate revenues approximating statewide uncompensated care costs. N.J.S.A. 26:2H-18(d) (repealed 1992). The charges collected from all patients and hospitals across the state were then pooled into a fund known as the New Jersey Health Care Trust Fund, and ultimately redistributed back to hospitals according to the amount of uncompensated care provided by them.

Another cost of doing business as a hospital (in some respects a variant of uncompensated care) is the cost of treating patients eligible for Medicare. Under federal law,

hospitals can charge such patients only the amount Medicare pays for the particular treatment. From 1980-1988, the Medicare program participated fully in New Jersey's rate system and accepted the rates established by it. In 1989, however, Medicare began paying hospitals in New Jersey at rates below the state-regulated rate – and, as has been widely acknowledged, below any reasonable measure of the cost of providing care. To enable hospitals to make up for the resultant shortfall in revenues, the state-regulated rate had to be adjusted, and a charge included in all hospital bills to make up for Medicare's below-cost reimbursement rates. *See* N.J.S.A. 26:2H-18(c) (repealed 1992). This charge came to be known, in New Jersey as elsewhere, as the "Medicare cost-shift." *See generally,* Congressional Report C-92-03, "Optional Hospital Payment Rates for Private Payers Based on Medicare's Methods" (March 1992) (detailing the prevalence throughout the United States of Medicare cost-shifts by hospitals).

Another charge built into hospital rates under New Jersey's former rate system related to "payor differentials." Under the operative rate statutes, and in keeping with their underlying purpose of cost-containment, the Hospital Rate Setting Commission was authorized to grant a "differential" (*i.e.*, price discount) to payors providing "quantifiable economic benefits . . . to the health care delivery system taken as a whole." *See* N.J.S.A. 26:2H-18(b) (repealed 1992). Under this provision, differentials were provided to "open enrollment" programs such as Blue Cross/Blue Shield because, by offering open enrollment, such programs reduced (or at least helped to contain) the number of uninsured patients – and, hence,

to contain the uncompensated care costs incurred by hospitals. Blue Cross receives a similar discount in many states. *See generally,* P. Ginsburg, "Hospital Cost Shifting," 310 New England Journal of Medicine 893 (April 1984). Payor differentials were also granted to health maintenance organizations ("HMOs") able to show the achievement of economic benefits through their efforts at "managed care." Hospital patients covered by Blue Cross or HMOs would thus be charged at a discounted rate, and patients not covered by such plans would be charged at a correspondingly higher rate.

New Jersey's former rate system did not dictate that third-party payors cover or be responsible for paying any amount, percentage or portion of hospital bills. Rather, it set the price of hospital care *for patients* in New Jersey. Third-party payors like the petitioning employee benefit plans were, as both a legal and practical matter, free to determine for themselves how much coverage they would provide for their plan members.*

Under the rate system, hospital costs in New Jersey rose steadily, as they did throughout the country during that time period (1978-1993). Data compiled by the American Hospital Association showed, however, that hospital rates in New Jersey during the period of rate regulation were generally lower than in neighboring states. From the

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*This feature of New Jersey's former rate system distinguishes it from the statutory scheme at issue in *Bricklayers Local No. 1 Welfare Fund v. Louisiana Health Ins. Ass'n,* 771 F. Supp. 771 (E.D.La. 1991), which involved charges imposed directly on ERISA plans, and from other cases that have occasionally arisen under ERISA involving state "mandatory benefits" laws.

record in this case, it cannot be said whether the rate system held the cost of hospital care below what it would have been in the absence of regulation, raised it above what it would otherwise have been, or had no substantial impact at all. Petitioners' repeated assertions that the rate system had a net detrimental economic impact on them is unsubstantiated. *See* Sup.Ct.R. 15.1.

II. The Proceedings Below.

In 1990, despite the fact that hospital rates in New Jersey were then generally lower than rates in nearby states, a number of self-insured employee benefit plans ("the Plans") filed suit in the United States District Court for the District of New Jersey, asserting that the State's rate system was preempted by ERISA. The Plans also asserted that the rate system resulted in a taking of their property without just compensation, and constituted an unlawful tax.

With respect to their preemption claim, the Plans contended that, because rates promulgated under the regulatory scheme included charges for uncompensated care, the Medicare cost-shift and payor differentials, plan administrators were effectively being compelled to divert plan resources to the benefit of non-beneficiaries, in direct violation of their fiduciary obligations under ERISA. In response, the State asserted that the challenged charges represented bona fide components of a regulated rate and thus did not constitute a diversion of plan assets, and that the rate system did not "relate to" ERISA plans but rather set the price of hospital care for patients.

In the District Court, all parties moved for summary judgment, and on May 27, 1992, the court (Hon. Alfred Wolin, U.S.D.J.) issued a decision holding in the Plans' favor on their preemption claim. In its decision, the District Court found that New Jersey's rate system related to employee benefit plans because it forced them "to structure benefits in a particular manner and subject[ed] the benefit plans to inconsistent regulations" from one state to another (80a).* The court rejected the Plans' constitutional arguments (85a).

The District Court thereafter entered an order enjoining the State and hospitals in the state from enforcing the contested rate statutes against the Plans. Surprisingly, the District Court also enjoined enforcement of the rate statutes against plan *beneficiaries,* because in the District Court's expansive view ERISA not only precluded the State from imposing the disputed charges against employee benefit *plans* (the rate system imposed no such charge), but also precluded it from imposing the charges against patients who happened to be enrolled in such plans (the rate system did impose such a charge, against *all* patients) (*See,* Appendix to this Brief).

On June 24, 1992, before the District Court's order took effect, the United States Court of Appeals for the

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*The District Court was unable to support this holding with a citation to any provision of state law requiring employee benefit plans to structure their benefits in any specified manner. Petitioners are likewise unable to do so anywhere in the four petitions they have filed. No such provision exists. (Appendix citations are to the appendix filed by petitioner NYSA-ILA Welfare Fund.)

Third Circuit issued a stay pending appeal. On appeal, in an opinion dated May 14, 1993, the Third Circuit reversed. The Third Circuit rejected the District Court's unsupported conclusion that New Jersey's rate system "force[d] employee benefit plans to structure benefits in a particular manner" (80a), and noted that, to the contrary, "New Jersey's scheme does not direct ERISA plans to structure their benefits or conduct their internal affairs in any particular way." (26a-27a). The Court of Appeals acknowledged that the rate system, by setting the price of hospital care in New Jersey, had an economic impact on employee benefit plans, but concluded that such an impact did not necessitate or justify a finding of preemption under the applicable decisions of this Court (26a).

With respect to the plans' contention that the rate system compelled them to divert plan assets to non-beneficiaries, the Third Circuit noted that this argument, if accepted, would give rise to a duty on the part of plan administrators to " 'look through' the pricing structure of every health care provider to assure that the price of the services rendered a particular patient directly correlates with the cost of those services." (31a). Such a duty, the court continued, would prove a practical impossibility in view of the "many forms of state regulation . . . which result in increases in the cost of [hospitals'] doing business." (31a). The court therefore concluded that Congress did not intend to impose such a duty on plan administrators, just as it never intended, through ERISA, to preempt states from exercising their traditional far-reaching regulatory powers over hospitals (32a).

Summarizing its preemption holding, the court concluded that New Jersey's former rate system was a

> generally applicable law which (1) is not intended to regulate the affairs of ERISA plans, (2) neither singles out such plans for special treatment nor predicates rights or obligations on the existence of an ERISA plan, and (3) does not have the effect of either dictating or restricting the manner in which ERISA plans structure or conduct their affairs or the effect of impairing their ability to operate simultaneously in more than one state. We have found no case that has held such a law to be preempted . . . and we decline to so hold. [30a].

The Third Circuit also rejected the Plans' "takings" arguments (22a). Applying the standards of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the court found that the rate system did not interfere with the plans' investment-backed expectations, but merely adjusted "the benefits and burdens of economic life to promote the common good." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

In dissent, Judge Nygaard wrote that the case "tests the outer limits of ERISA preemption" (32a), but that he would affirm the District Court's judgment. Judge Nygaard was persuaded that a preemptive "relation" between the rate system and ERISA plans existed because the rate system, as all parties acknowledged, would not be viable if ERISA plans and their beneficiaries were excluded from it.

III. New Jersey's Deregulation of Hospital Rates.

During the time that this matter was before the Third Circuit, New Jersey abolished its hospital rate system,

which had been politically controversial from its outset, and deregulated hospital rates. 1992 N.J. Laws, c.160. In an attempt to avoid the price volatility and disruptions that might otherwise arise with deregulation, the Legislature imposed one-year revenue caps on all hospitals, but as of January 1, 1993, the rate system that is the subject of this case ceased to exist.

Although this development rendered the Plans' claims for prospective relief moot, it did not render moot their attempt to avoid responsibility for paying hospital bills issued to their plan members during the pendency of the action – a responsibility, it bears repeating, imposed upon them by their own governing plan instruments, not by the rate system. The Third Circuit accordingly proceeded to decide the appeal before it (22a).

REASONS FOR DENYING THE WRIT

I. Summary of Argument.

In urging the Court to grant certiorari, petitioners assert that the opinion below conflicts with applicable ERISA decisions of this Court and other circuits. This assertion does not withstand scrutiny. The opinion below adheres to settled principles of preemption law, reaches a result that accords with this Court's ERISA decisions, and expressly follows the one other Court of Appeals decision to address a similar issue, *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985) (upholding New York's hospital rate system against an ERISA challenge).

Petitioners correctly maintain that this Court, in its recent ERISA decisions, has reaffirmed that ERISA's preemptive scope is broad, *see, e.g., FMC Corp. v. Holliday,* 498 U.S. 52, 58 (1990), but this uncontroversial point was not lost on the court below. The Court of Appeals recognized that the legal inquiry did not end there, however, since it remains true under recent decisions that ERISA's preemptive reach, though broad, is not without limits, and that state laws of general applicability having only a tenuous, remote or peripheral connection with employee benefit plans are not preempted. *District of Columbia v. Greater Washington Board of Trade,* 113 S.Ct. 580, 583 (1992); *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 33, 39 (1990).

Although petitioners cast themselves as defenders of this Court's ERISA jurisprudence, the result they seek to achieve is far outside the domain of established law. Petitioners' central thesis – which they understandably choose not to state in express terms – is that ERISA precludes states from engaging in hospital rate regulation. Thus, at the same time that petitioners assert that ERISA provides a federal exemption from New Jersey's rate system for their plan beneficiaries, they also acknowledge, and even stress, that any hospital rate system that excluded patients covered by employee benefit plans from its scope would, as a practical matter, be unworkable. *See, e.g.,* Petition of United Wire, Metal & Machine Health and Welfare Fund at 21-22.

As is clear on a moment's reflection, if the latter point is true (and it quite clearly is), it follows that ERISA effectively prohibits states from engaging in hospital rate regulation. *Cf. Travelers Inc. Co. v. Cuomo,* 813 F.Supp. 996,

1006 (S.D.N.Y. 1993) *appeal pending* (holding New York's hospital rate system to be preempted; the court acknowledged that, under its legal analysis, it would follow that "ERISA preempts all state hospital rate-setting statutes.") From a public policy standpoint, such a result might or might not be beneficial (the data from New Jersey are inconclusive), but from a legal standpoint there is no reason to think that Congress intended to achieve that result when it enacted ERISA. To the contrary, Congress has consistently encouraged state efforts to contain health care costs. *See, e.g.*, 42 U.S.C. § 1395ww(6)(1) (authorizing the Secretary of Health and Human Services to waive Medicare's rate schedule and to participate in state "hospital reimbursement control systems").

Petitioners' underlying thesis is not only at odds with Congressional intent, but rests on a legal paradox. Under clearly established law, any state system of hospital rate regulation that purported to *exclude* employee benefit plans and their beneficiaries from its scope would be flatly preempted. *Mackey v. Lanier Collection Agency & Services, Inc.*, 486 U.S. 825 (1988) (Georgia garnishment statute providing exemption for employee benefit plans "related to" such plans and was preempted). If petitioners' position were upheld, therefore, ERISA would prevent states from including *or* excluding plan beneficiaries from a rate-setting system – which is again to say that states could not engage in rate regulation at all.

The Court of Appeals did not depart from established law in rejecting petitioners' boundless interpretation of ERISA. The decision below comports with the applicable precedents of this Court, presents no conflict with any other circuit court decision, and is sound on its

own merits. With the repeal of the rate system, any arguable "special and important reasons" that might once have existed to warrant this Court's involvement have vanished, Sup.Ct.R. 10, and the petitions for certiorari should accordingly be denied.

II. The Decision Below Represents a Correct Application of Settled ERISA Law and Is Not in Conflict With the Law of Any Other Circuit.

A. ERISA Preemption Standards.

ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). In determining whether a state law "relates to" employee benefit plans under the statute, "as in any preemption analysis 'the purpose of Congress is the ultimate touchstone.' " *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

Congress' purpose in enacting ERISA was "to safeguard employees from the abuse and mismanagement of [employee benefit] funds." *Massachusetts v. Morash*, 490 U.S. 107, 112 (1989). To effectuate this purpose, ERISA imposes uniform federal standards on reporting, disclosure and fiduciary responsibility, 29 U.S.C. §§ 1021-1031, 1101-14, but a state law need not intrude upon these specific subject areas to be preempted, nor need its relation to employee benefit plans be direct or express. *FMC Corp. v. Holliday*, 498 U.S. 52, 58-59 (1990). Rather, a state law "relates to" employee benefit plans if, within the "broad common-sense meaning of that

phrase," it "has a connection with or reference to" such plans. *Ingersoll-Rand, supra,* 498 U.S. at 39; *see also Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47 (1987).

On the other hand, a state law that has only a "tenuous, remote or peripheral connection with covered plans . . . as is the case with many laws of general applicability" will not be preempted. *District of Columbia v. Greater Washington Board of Trade,* 113 S.Ct. 580, 583 n.1 (1992); *Ingersoll-Rand, supra,* 498 U.S. at 39 (generally applicable statutes that make no reference to or function irrespective of benefit plans not preempted). Preemption follows only if a state law relates to employee benefit *plans,* moreover. *Fort Halifax Packing Company, Inc. v. Coyne,* 482 U.S. 1, 8 (1987) ("Congress' choice of language is significant" in that it preempts only laws that relate to plans); *Ingersoll-Rand, supra,* 480 U.S. at 39 ("only state laws that relate to benefit plans are preempted"); *cf. Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 523 (1981) (Congress, in enacting ERISA, "meant to establish pension plan regulation as exclusively a federal concern").

B. Discussion.

The decision below represents a straightforward application of these settled legal standards. The Court of Appeals examined each asserted connection between the Plans and the rate statutes, and rightly concluded that, under the ERISA decisions of this Court, none of them established the requisite preemptive "relation." In so holding, the court was guided not only by the decisions of this Court (24a-26a), but also by the one other Court of Appeals decision to address an ERISA challenge to a

state system of hospital rate regulation, *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

As they did below, petitioners vigorously assert that *Rebaldo* is no longer good law because it pre-dates this Court's decisions in *FMC Corp.* and *Ingersoll-Rand Co.*, and because certain passages from the Second Circuit's opinion take a narrower view of ERISA's preemptive scope than the Court espoused in those later cases. The court below, however, was careful to limit its reliance on *Rebaldo* to those portions of the opinion that remain legally sound. In particular, the court below embraced the observation made in *Rebaldo* that a finding of preemption cannot be based on the mere fact that a state statute or regulation affects a plan's "cost of doing business" since many (if not all) types of state regulations have such an effect. 749 F.2d at 138-39. In making that observation, the Second Circuit was not announcing a new or controversial rule of law; it was stating a plain fact, and nothing in the ERISA cases that have been decided since *Rebaldo* erodes the Second Circuit's wholly logical reasoning on this score. *Accord Lane v. Goren*, 743 F.2d 1337, 1340 (9th Cir. 1984) (state statutes prohibiting employment discrimination not preempted despite the fact that such laws, like laws "regulating zoning, health and safety, increase the operational costs of ERISA trusts").

Another intrinsically sound aspect of the *Rebaldo* opinion is its recognition that whether or not states engage in rate regulation, hospitalization costs will always vary from state to state and that, in consequence, statutes that merely set the price of hospital care within a given state cannot be said to subject ERISA plans to

inconsistent local regulation. 749 F.2d at 139. Petitioners are unable to point to any flaw in this syllogism, but assert that New Jersey's rate statutes did more than set the price of hospital care because it imposed a "disproportionate" share of certain costs on ERISA plans. Thus, petitioners inveigh that, in the last years of the rate system, ERISA plan participants constituted only 15% of New Jersey's hospital patients but were assessed with 40% of the challenged "cost shifts."

Although plausible on its face, petitioners' "disproportionality" argument turns out, on examination, to be an exercise in statistical sophistry. The seeming inequity of the distribution of the costs shifts evaporates when it is recalled that the largest of the "cost shifts" – by far – related to uncompensated care, *i.e.*, care rendered to nonpaying or underpaying patients. By definition, such patients (who unfortunately constitute a substantial portion of the total patient population themselves) will not bear their "proportional" share of costs; rather they will *cause* hospitals to have to seek to recover those costs from all other patients, thus *creating* a "disproportionate" load for those patients.

To the extent petitioners' "disproportionality" argument does more than reflect the fact that hospitals in New Jersey, as in other states, incur substantial uncompensated care costs, it is still lacking in force. The "cost shift" that arose from Medicare's below-market reimbursement rates was as much a product of federal law as it was of New Jersey's rate system, and petitioners provide no support for the notion that Congress intended ERISA plan participants, alone among non-Medicare patients, to be exempted from such costs. Likewise, the challenged

"cost shift" relating to payor differentials resulted in no true "disproportion," since such differentials were granted only on the basis of demonstrated economies benefiting the hospital system as a whole. Nothing in the record suggests any gross disparity between the size of the payor differentials and the benefits bestowed.

Petitioners' aspersive descriptions of the challenged "cost shifts" notwithstanding, *see, e.g.*, NYSA-ILA Petition at 7-8,* each of the charges in question corresponded to a real cost of doing business as a hospital, and consequently each of the charges was a legitimate component of a regulated hospital rate. That being so, petitioners' preemption argument amounts to a claim that, through ERISA, Congress has given plan administrators unilateral power (or, as the Court of Appeals put it, a duty) to determine for themselves and their plan beneficiaries what constitutes a "reasonable" hospital bill. Unpersuasive as this contention is on first blush, it becomes even less attractive when one considers that, were it to be upheld, federal courts would become the arbiters of everyday billing disputes between ERISA plan members and healthcare practitioners, and would have to develop

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*Petitioners' oft-repeated assertion that New Jersey's rate system was deliberately designed to target ERISA funds and to discriminate against employee benefit plans is more than aspersive; it is false. *See* Sup.Ct.R. 15.1. Since the rate system imposed no coverage obligations on ERISA plans (or any other third-party payors), it was fundamentally incapable of "discriminating" against them in the fashion complained of; perhaps more to the point, petitioners are unable to show any respect in which ERISA plans or their beneficiaries were treated less favorably than ordinary commercial insurers and their beneficiaries.

a new body of federal common law to resolve such disputes.*

While the powers bestowed upon plan administrators under ERISA are broad, they convey no license to "mark down" hospital bills on behalf of plan members. *Rebaldo, supra,* 749 F.2d at 138-139 (rejecting the idea that ERISA plans lead a "charmed existence"). They *do* encompass a power to structure plan benefits to cover so much – or so little – of members' hospital bills as may be deemed desirable, but New Jersey's former rate statutes did not trammel upon or in any way limit that power. *Compare Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739 (1985) (mandatory benefits law "related to" employee benefit plans, but was not preempted as to insurance companies selling policies to plans); *FMC Corp. v. Holliday, supra* (anti-subrogation law preempted because it dictated how plans had to structure benefits.)

Petitioners' assertion that New Jersey's former rate statutes made express "reference" to employee benefit plans is even less compelling than their exaggerated claims of "discrimination." The *only* reference to ERISA plans in the rate statutes was contained in a provision imposing a duty on hospitals to ascertain whether a prospective patient had any form of medical coverage.

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*This would be true, it should be noted, even in states where hospital rates are not subject to state regulation. Throughout the country, the right of hospitals and doctors to collect ōn their bills is governed by state law, and whether that law derives from a statute or case law it "relates" to ERISA plans in exactly the same fashion and to the same extent as New Jersey's former rate laws – which is to say indirectly and peripherally.

N.J.S.A. 26:2H-18.31 (expired 1992). That provision required hospitals to

> inquire of the patient . . . whether the patient is covered by health insurance, and if so shall require documentation . . . Documentation may include a government sponsored health plan card or number, a group sponsored or direct subscription health plan card or number, a commercial identification card or claim form or a *union welfare plan identification card or claim form.* [Emphasis added.]

The obvious, and salutary, purpose of this provision was to ensure that hospitals took reasonable steps to keep their uncompensated care costs to a minimum. For petitioners, who complain so loudly about the growth of uncompensated care costs, to suggest simultaneously that the above provision ran afoul of ERISA is, to say the least, perplexing. Petitioners surely do not maintain that hospitals are prohibited by ERISA from ascertaining whether patients have some form of medical coverage, and yet they seem to be saying that hospital officials should be required to preface patient interviews with a warning to the effect of, "Under no circumstances should you tell me if you belong to a union benefit plan." Since such a disclaimer would *still* involve a "reference" to ERISA plans (at least as petitioners construe that term), the Court of Appeals did well to reject this odd contention, and broke no new legal ground in doing so. *See Pilot Life*

Ins. Co. v. Dedeaux, supra, 481 U.S. at 47 (ERISA's preemptive language should be given "its broad *common-sense* meaning"; emphasis added).*

In the final analysis, the only true "relation" between employee benefit plans and the challenged rate system is that, by setting the price of hospital care in New Jersey, the rate system had an undeniable, albeit indeterminate, economic impact on employee benefit plans. No decision by this Court has held that such an impact alone results in preemption. Petitioners assert that the Fifth Circuit has found economic impact to be sufficient to establish a preemptive "relation" in *E-Systems, Inc. v. Pogue,* 929 F.2d 1100 (5th Cir.), *cert. denied,* 116 L.Ed.2d 610 (1991), but that case involved a tax imposed specifically on persons rendering services to any "employer-employee . . . health benefit plan." Thus, the statute's relation to benefit plans was not merely economic, and was anything but "tenuous" and "peripheral"; to the contrary, it was direct and practically *exclusive.*

Petitioners also seize upon dicta from *Arkansas Blue Cross and Blue Shield v. St. Mary's Hospital, Inc.,* 947 F.2d 1341 (8th Cir. 1991), *cert. denied,* 112 S.Ct. 2305 (1992), in

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*The "reference" to employee benefit plans contained in the New Jersey Department of Health's policy statement regarding patient appeals again merely lists employee benefit plans as one possible form of third-party coverage. The policy statement (which was not itself part of the statutory rate scheme) merely recognized, as an incontrovertible fact, that employee benefit plans are a common type of third-party payor. That petitioners construe ERISA's preemptive language to mean that this fact must never be acknowledged in writing by state officials demonstrates the artificiality of their position.

an attempt to generate a conflict between the Eighth Circuit and the court below. In that case, the Eighth Circuit questioned – as the Fifth Circuit had done before it, *see Somers Drug Stores v. Corrigan Enterprises Inc.*, 793 F.2d 1456, 1467 (5th Cir. 1986) – whether the fact that a state law falls within the state's traditional police powers has any legal relevance in ERISA preemption disputes. 947 F.2d at 1350. The court left the question hanging, although it allowed that "this factor is arguably a policy consideration useful in deciding borderline" ERISA cases. *Id.*

If the Fifth Circuit or Eighth Circuit ever chose to formalize their speculative views on this rather fine point of ERISA law in a legal holding, a genuine conflict among the circuits would clearly exist. *Compare, e.g., Aetna Ins. Co. v. Borges*, 869 F.2d 142, 144 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989) (observing, in an ERISA case, "we must assume 'that the historic police powers of the State were not to be superseded . . . unless that was the clear and manifest purpose of Congress' "; quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 988, 994 (1978)). It seems doubtful that a genuine conflict on this point will ever arise, however, since this Court has made perfectly clear that, in addressing questions of preemption under ERISA – as under any other federal statute – the Court "must presume that Congress did not intend to preempt areas of traditional State regulation." *Metropolitan Life Ins. Co. v. Massachusetts, supra*, 471 U.S. at 740 (1985). This negative presumption is bottomed on basic precepts of federal-state comity; thus, for instance, in *Fort Halifax Packing Co. v. Coyne, supra*, the Court wrote:

> ERISA pre-emption analysis 'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.' [482 U.S. at 19, *quoting Alessi v. Raybestos-Manhattan, Inc,* 451 U.S. 504, 522 (1982)].

It is true, as the Eighth Circuit observed in *Arkansas Blue Cross, supra,* that the Court has not invoked this canon of statutory construction in its most recent ERISA decisions. Given the extensive body of ERISA law on which the Court is now writing, there would seem little need. Neither the Third Circuit nor any other Court of Appeals would be at liberty to assume that, by the omission, the Court has implicitly overruled its earlier decisions, *Rodriguez DeQuijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), and no reason exists to think that it has.

The applicable decisions of this Court and of other circuits establish that where, as here, a regulatory scheme has an indirect economic impact on ERISA plans, a number of considerations must be taken into account to determine if the scheme is preempted. Those considerations include whether the law in question involves an exercise of traditional state police powers, *Metropolitan Life, supra,* as well as whether it interferes with the administration of ERISA plans, or mandates that they provide a particular type or level of benefit, or subjects them to inconsistent regulation. *See, e.g., Aetna Life Ins. Co. v. Borges, supra,* 869 F.2d at 145-146 (surveying ERISA cases and noting that Congress "could not possibly have meant to preempt all laws having any impact on plans, no matter how small or how tangential"). The Court of Appeals examined each of these relevant criteria, and

concluded that they did not support a finding of preemption. The court's legal analysis and conclusion were consistent with and faithful to existing law, and its rejection of petitioners' overreaching contention that ERISA precludes state regulation of hospital rates presents no reason for further review by this Court.

III. The Court of Appeals' Holding That New Jersey's Hospital Rate-setting System Does Not Result in a Compensable "Taking" of the Plans' Property Presents No Questions Requiring Review by This Court.

The NYSA-ILA Plan, alone among petitioners, seeks review of the Court of Appeals' affirmance of the District Court's dismissal of the Plans' "takings" claim. The Court of Appeals' decision on this point represents a sound and even elementary application of established law, and does not remotely meet any of the criteria for issuance of a writ of certiorari.

Outside the area of "physical" takings, a three-prong test determines whether a compensable taking has occurred. Under that test, courts must examine the character of the governmental action involved, the economic impact of that action on the claimant, and the extent to which it has interfered with the claimant's "distinct investment-backed expectations." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

The challenged governmental action here is the inclusion of certain "indirect" costs in regulated hospital rates. The costs in question, while indirect, are true costs incurred by hospitals and, in providing for them to be

spread among all hospitals and hospital patients, New Jersey's rate system sought merely to adjust "the benefits and burdens of economic life to promote the common good." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986). The economic impact of New Jersey's rate system upon the Plans, as has been noted, is indeterminate since hospital rates in New Jersey under the system were roughly in line with, but somewhat lower than, rates in nearby states. Clearly, though, the system did not interfere with the Plans' "investment-backed expectations." The Plans exist in order to pay the medical bills of their beneficiaries, and have never had a reason to think that their beneficiaries occupy a special status among hospital patients exempting them from charges borne by other patients. The Court of Appeals' rejection of Petitioners' unmeritorious takings argument thus needs no attention from this Court.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 29, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED WIRE, METAL & MACHINE HEALTH AND WELFARE FUND, et al.,	Civil Action No. 90-2639 (Consolidated)
Plaintiffs,	AMENDED ORDER
v.	(Filed June 4, 1992)
MORRISTOWN MEMORIAL HOSPITAL, et al.,	
Defendants.	

The Court hereby amends its Order dated May 27, 1992 as follows:

It is on this 4th day of June, 1992,

ORDERED, that the state defendants are permanently enjoined from enforcing the provisions stated in its May 27, 1992 order as to participants in ERISA plans only.

/s/ Alfred M. Wolin
ALFRED M. WOLIN, U.S.D.J.